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# Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest

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# Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest

Bruce A. Green\*

## INTRODUCTION

What are the responsibilities of a prosecutor when she learns in the course of preparing for trial that defense counsel has a potential conflict of interest? Must the prosecutor alert defense counsel and the trial judge to the problem? May she move to disqualify defense counsel?

If a prosecutor were no different from any other trial lawyer, the answers would be fairly simple. As a general rule, a lawyer is not her "brother's keeper."<sup>1</sup> She has no obligation to anticipate and prevent opposing counsel's errors, whether of law, of tactics, or of ethics; to the contrary, it is a customary aspect of skilled advocacy to exploit opposing counsel's missteps.<sup>2</sup> Accordingly, in civil cases, a trial lawyer is ordinarily entitled to remain silent when opposing counsel has merely a potential conflict of interest.<sup>3</sup> A civil trial lawyer generally

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1. As the District Court noted in *In re Timmerman*, 26 F. Supp. 600, 600 (D. Or. 1939), there is no record that Cain's question—"Am I my brother's keeper?"—was ever answered. See also *Furr v. Spring Grove State Hosp.*, 53 Md. App. 474, 475, 454 A.2d 414, 414 (1983).

2. In contrast, a lawyer may have a responsibility to ensure that his associates or partners conform to the rules of professional conduct. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 2-103, 4-101(D) & 7-107(J) (1981); *id.*, EC 1-4, 3-8, 3-9, 4-2, 4-5, & 6-2; MODEL RULES OF PROFESSIONAL CONDUCT, Rule 5.1 (1987). The Model Rules have been adopted by slightly more than half the states; the Code remains in effect in the other states.

3. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1379 (1976) (Disciplinary Rule 1-103(A) of the Model Code of Professional Responsibility does not require an advocate to disclose opposing counsel's potential conflict); see generally Comment, *The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest*, 1979 DUKE L.J. 1310, 1318-19; but see *In re Gopman*, 531 F.2d 262, 265 (5th Cir. 1976) ("When an attorney discovers a possible ethical violation concerning a matter before a court, he is not only authorized but is in fact obligated to bring the problem to that court's attention."). There may be a greater responsibility in class action litigation, however, since the class members will not be bound by an adverse decision if their attorney had a conflict of interest. See *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

has no duty to alert the court until opposing counsel becomes embroiled in an actual conflict of interests amounting to a disciplinary violation.<sup>4</sup>

A prosecutor's role in the adversary process has traditionally been regarded quite differently from that of most other trial lawyers. Although the courts and the organized bar often stress the responsibility that all trial lawyers owe to the court and to society in general,<sup>5</sup> prosecutors are held to a particularly high standard. As a representative of the government, a prosecutor has an interest in the rendition of just verdicts, and a corresponding responsibility to ensure that a criminal defendant is not unjustly convicted and that the proceedings leading up to a conviction are fair. These responsibilities have been recognized by both the judiciary and the organized bar. In *Berger v. United States*,<sup>6</sup> for example, the Supreme Court placed particular emphasis on the prosecutor's duty to ensure the fairness of the outcome of a criminal proceeding:

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4. Under the Model Code of Professional Responsibility, an advocate is required to alert the court to ethical misconduct which is known to have been committed by another lawyer. Disciplinary Rule (DR) 1-103(A) of the Code provides that "[a] lawyer possessing unprivileged knowledge of [a lawyer's misconduct] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981). See also Ethical Consideration (EC) 1-4 ("The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules."). *Id.*

Therefore, under the Code a lawyer may be obliged to alert the court when she knows that opposing counsel has an actual conflict of interest which is clearly proscribed by the Code. See, e.g., *In re Gopman*, 531 F.2d 262, 265-66 (5th Cir. 1976) (a lawyer has a duty under DR 1-103(A) to apprise the trial court of opposing counsel's actual conflict); *Estates Theatres, Inc. v. Columbia Pictures Indus. Inc.*, 345 F. Supp. 93, 98 (S.D.N.Y. 1972); see generally Comment, *supra* note 3, at 1317-18.

A lawyer probably would not be obliged to make disclosure under the Model Rules of Professional Conduct; however, unlike the Code, the Model Rules limit the circumstances in which a lawyer must disclose another lawyer's misconduct. Model Rule 8.3(a) provides that "[a] lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." MODEL RULES OF PROFESSIONAL CONDUCT (1987). It is doubtful that representing conflicting interests at trial raises "a substantial question as to [the other] lawyer's honesty, trustworthiness or fitness." Moreover, Model Rule 8.3 requires disclosure only to a disciplinary body, rather than to the trial court. *Id.*

Some states, such as Massachusetts, have declined to adopt DR 1-103(A), Model Rule 8.3, or an equivalent rule. Moreover, critics of the so-called "snitch rule" point out that even where the rule is in effect, it is often violated and almost never enforced. See generally Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193; but see *In re Himmel*, 125 Ill. 2d 531, 533 N.E.2d 790 (1988) (suspending attorney for one year for failing to report the misconduct of another attorney who converted his client's funds).

5. See, e.g., ABA Comm. on Professionalism, "In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism," 10 (1986) ("The practice of law in the spirit of a public service can and ought to be the hallmark of the legal profession.") (quoting R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953)).

6. 295 U.S. 78 (1935).

[The prosecutor] is a representative not of an ordinary party to a controversy, but of a sovereign whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.<sup>7</sup>

Some years later, in *Donnelly v. DeChristofa*,<sup>8</sup> Justice Douglas, stressed the prosecutor's duty to guarantee the fairness of the process by which a criminal conviction is obtained. He observed that the prosecutor's "function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."<sup>9</sup> Moreover, the duty to promote the fairness of criminal proceedings includes, as a corollary, a duty to avoid the public perception that criminal proceedings are unfair.<sup>10</sup>

A prosecutor has also been characterized as "an administrator of justice"<sup>11</sup> who has an affirmative responsibility to promote the orderly, efficient administration of criminal justice. This responsibility includes, among other things, a duty to avoid missteps that will result in reversals of criminal convictions and necessitate retrials.<sup>12</sup>

Although the ABA Code of Professional Responsibility (1972) recognizes that, as a general matter, "[t]he responsibility of a public prosecutor differs from that of the usual advocate,"<sup>13</sup> it does not explain how the different responsibilities are implicated when opposing counsel has a potential conflict of interest. Nothing in the Code indicates that, in responding to his adversary's potential conflict, a prosecutor might have a different, and greater, responsibility than her civil counterpart.<sup>14</sup>

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7. *Id.* at 88. *Accord* *Young v. United States ex rel. Vuitton*, 107 S. Ct. 2124, 2135 (1987) (plurality opinion of Brennan, J.); CANONS OF PROFESSIONAL ETHICS, Canon 5 (1908) ("The primary responsibility of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."); see generally Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197 (1988).

8. 416 U.S. 637 (1974) (Douglas, J., dissenting).

9. *Id.* at 649.

10. See *Patterson v. Illinois*, 108 S. Ct. 2389, 2404 (1988) (Stevens, J., dissenting).

11. ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-1.1(b) (2d ed. Feb. 1979).

12. Similarly, a prosecutor has a responsibility to ensure that criminal charges are resolved promptly, *id.*, Standard 3-2.9, and to give appropriate regard to the interest of judicial economy in exercising discretion with respect to such matters as whether defendants should be jointly charged or multiple charges should be brought in a single indictment.

13. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (1972).

14. In addition to DR 1-103(A), two other general provisions of the Code are potentially relevant. The first, DR 7-103(B) recognizes that, in some respects, prosecutors have a greater responsibility than other lawyers to disclose information that is helpful to the opposing party. It requires a prosecutor to disclose exculpatory evidence as well as evidence which tends to mitigate the alleged offense or justify a reduction in punishment. But nothing in the rule requires a prosecutor to disclose information relating to the quality of defense counsel's representation. *Accord*

Unlike the Code, the more recent ABA Model Rules of Professional Conduct (1983) do specifically recognize the prosecutor's responsibility in conflict-of-interest cases, but they address it only superficially, recommending that a prosecutor exercise "caution" in deciding whether to object to counsel's representation.<sup>15</sup> The failure to address this problem at any greater length is somewhat surprising, since the lawyers' codes have traditionally focused on the conduct of trial lawyers,<sup>16</sup> with particular emphasis on conflicts of interest.<sup>17</sup> Moreover, the need for some kind of guidance is ever increasing, as courts and commentators continue to express concern that motions to disqualify opposing counsel based on conflicts of interest may be used to obtain an unfair tactical advantage in both criminal<sup>18</sup> and civil cases.<sup>19</sup>

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ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.11 (2d ed. Feb. 1979); Model Rule 3.8(d).

The second relevant provision, DR 7-102(A)(1), provides that a lawyer should not take action merely to harass the opposing party. This rule has occasionally been applied to prosecutors. *See, e.g., In re Rook*, 276 Or. 695, 556 P.2d 1351 (1976) (refusal to plea bargain with particular defendant violated disciplinary rule). It would forbid a prosecutor from moving to disqualify defense counsel simply for purposes of harassment. But nothing in this rule or elsewhere in the Code establishes when a prosecutor may legitimately file a disqualification motion.

15. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7, comment (1983).

16. *See, e.g., C. WOLFRAM, MODERN LEGAL ETHICS* 54 and n.26 (1986).

17. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101 to 5-107 (1972); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 to 1.12 (1983).

18. *See, e.g., Margolin & Coliver, Pretrial Disqualification of Criminal Defense Counsel*, 20 AM. CRIM. L. REV. 227, 229 (1982); WOLFRAM, *supra* note 16 at 318 n.21; *see also* Genego, *Prosecutorial Control Over a Defendant's Choice of Counsel*, 27 SANTA CLARA L. REV. 17, 19-20 (1987).

19. *See, e.g., Trinity Ambulance Serv., Inc. v. G&L Ambulance Serv., Inc.*, 578 F. Supp. 1280, 1282-83 & n.7 (D. Conn. 1984); Bayer & Abrahams, *The Ethics for Moving for Disqualification of Opposing Counsel*, 13 COLO. LAW. 55 (1984); Chapman, *Disqualification of Attorneys—A Critical Analysis*, 30 TRIAL LAWYER'S GUIDE 456, 491-2 (1986); Note, *Federal Courts and Attorney Disqualification Motions: A Realistic Approach to Conflicts of Interest*, 62 WASH. L. REV. 863, 873-75 (1987). Disqualification motions may be used in civil cases for various strategic purposes, such as to obtain delay, *see, e.g., Armstrong v. McAlpin*, 625 F.2d 433, 437 (2d Cir.) (en banc), *vacated*, 449 U.S. 1106 (1981), or to deprive the opposing party of a particularly good lawyer. *See, e.g., Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562, 574 (2d Cir. 1973). In many civil cases, the party moving for disqualification has no legitimate interest of its own at stake but purports to advance the interests of the party opposing disqualification. In such cases, courts typically recognize the moving party's "standing" to raise the alleged conflict. *See, e.g., Kramer v. Scientific Control Corp.*, 534 F.2d 1085 (3rd Cir.) *cert. denied* 429 U.S. 830 (1976); *Duca v. Raymark Indus.*, 663 F. Supp. 184, 188 (E.D. Pa. 1986); *Black v. State of Missouri*, 492 F. Supp. 848, 861-62 (W.D. Mo. 1980); *Rice v. Baron*, 456 F. Supp. 1361 (S.D.N.Y. 1978); *but see In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 88 (5th Cir.) *reh'g denied* 536 F.2d 1025 (5th Cir. 1976) ("As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification.").

In the past few years, the judiciary has begun to address some of the questions that have been left unanswered by the organized bar. Pursuant to their supervisory authority over attorneys who practice before them,<sup>20</sup> a small number of courts have given prosecutors explicit instructions about how to proceed when they learn that defense counsel may have a conflict.<sup>21</sup> Other courts have given guidance to prosecutors indirectly by expressing disapproval of particular prosecutorial conduct that has come to their attention.<sup>22</sup> The judicial effort to define the prosecutor's role has been complicated by the recognition that, while a prosecutor has an ethical duty much like that of the court itself, the prosecutor has potentially conflicting responsibilities and interests arising out of her role as an advocate in the adversary process.<sup>23</sup>

This Article explores the responsibilities that courts have begun to, and ought to, impose on prosecutors. In large part, the prosecutor's responsibilities are subordinate to those of defense counsel and the trial judge, who have the primary responsibility to ensure that the defendant's right to independent counsel is not unfairly abridged. Therefore, as background to a discussion of the prosecutor's role, Part I discusses the roles of defense counsel and of the trial judge in cases in which defense counsel has a potential conflict of interest.

Part II then explores the scope and nature of the prosecutor's ethical responsibility in cases in which defense counsel has a potential conflict of interest. In particular, it considers whether a prosecutor has a duty to disclose the potential conflict to defense counsel and to the trial judge, and whether, in addition, a prosecutor must move, or refrain from moving, to disqualify defense counsel. Part II discusses these

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20. It has long been recognized that courts have inherent authority to regulate the practice of lawyers who appear before them. *See generally In re Snyder*, 472 U.S. 634 (1985); *Howell v. State Bar of Texas*, 843 F.2d 205, 206-07 (5th Cir.) reh'g denied 424 U.S. 936 (1976); *Dowling, The Inherent Power of the Judiciary*, 21 A.B.A. J. 635 (1935); *Green, The Courts' Power Over Admission and Disbarment*, 4 TEX. L. REV. 1 (1925); *Jeffers, Government of the Legal Profession: An Inherent Judicial Power Approach*, 9 ST. MARY'S L.J. 385 (1978); *Note, Legislative or Judicial Control of Attorneys*, 8 FORDHAM L. REV. 103 (1939); *Note, The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1986).

21. *See, e.g., Mannhalt v. Reed*, 847 F.2d 576, 583-84 (9th Cir.) cert. denied 109 S. Ct. 260 (1988); *United States v. Holley*, 826 F.2d 331, 333 (5th Cir.); *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986); *United States ex rel. Vriner v. Hedrick*, 500 F. Supp. 977, 983 (C.D. Ill. 1980); *People v. Mattison*, 494 N.E.2d 1374, 1378-9, 67 N.Y.2d 462, 471 (1986).

22. *See, e.g., United States v. Mitchell*, 572 F. Supp. 709, 713, 716 (N.D. Cal. 1983), *aff'd*, 736 F.2d 1299 (9th Cir. 1984), cert. denied, 474 U.S. 830 (1985).

23. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980) (In the adversary system, prosecutors need not be entirely "neutral and detached," but must necessarily be zealous in their enforcement of the law.) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972)).

questions in the context of four criminal cases in which the prosecutor undertook different courses of conduct after learning in advance of trial that the defendant's attorney might have a conflict of interest. The Article argues that, unlike a civil litigator, a criminal prosecutor has a duty to disclose defense counsel's potential conflict to both the defense attorney and to the trial judge. In addition, a prosecutor has a duty to seek a judicial hearing at which the defendant would either waive his constitutional right to conflict-free representation or agree to be represented by an attorney who does not have a potential conflict. Part II considers and rejects arguments in favor of a more limited ethical role for prosecutors.

Finally, Part III examines two unsettled, and largely unexplored, questions: first, does the prosecution have a responsibility to cooperate in eliminating conflicts of interest which would otherwise necessitate defense counsel's disqualification; and second, under what circumstances is it proper for a prosecutor to seek defense counsel's disqualification notwithstanding the defendant's willingness to waive conflict-of-interest claims? The Article argues that, in certain cases, the prosecutor should cooperate to eliminate conflicts even though they were not deliberately manufactured by the prosecution. It also argues that disqualification motions should be limited to those cases in which (a) the defendant's waiver may not be valid; (b) the defense attorney is so likely to have a serious conflict of interest that his representation may undermine the appearance that the trial is being conducted fairly and ethically; or (c) the government has legitimate interests which may be impaired by defense counsel's conflict of interest. The Article proposes that, in order to minimize the appearance that disqualification motions are being used to obtain an unfair tactical advantage, prosecutors' offices should adopt and comply with guidelines which impose these limitations on the use of disqualification motions.

## I. BACKGROUND: THE ROLE OF DEFENSE COUNSEL AND THE TRIAL JUDGE

### *A. Defense Counsel's Ethical Responsibility*

A criminal defendant has a constitutional right to receive the representation of an independent attorney.<sup>24</sup> In a criminal case, defense counsel's independence may be compromised in a variety of ways. It has long been recognized, for example, that when a defense lawyer rep-

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24. See, e.g., *Burger v. Kemp*, 107 S. Ct. 3114 (1987); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978).

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resents two or more jointly charged defendants, there is a significant risk that the lawyer will be unable to adequately serve the interests of both defendants.<sup>25</sup> A conflict of interest may also arise in a criminal case when a defense attorney has an uncharged client whose interests are contrary to those of the accused,<sup>26</sup> when a defense lawyer is called upon to cross-examine another client<sup>27</sup> or a former client,<sup>28</sup> when a defense lawyer has personal knowledge that might make him a useful witness on behalf of his client,<sup>29</sup> or when a defense lawyer is himself the subject of a criminal investigation.<sup>30</sup>

Defense counsel has the principal responsibility for ensuring that the defendant's right to independent counsel is respected.<sup>31</sup> This

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25. See, e.g., Cole, *Time for a Change: Multiple Representation Should Be Stopped*, 2 J. CRIM. DEFENSE 149 (1976); Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibility of the Defense Attorney*, 62 MINN. L. REV. 119 (1978); Girgenti, *Problems of Joint Representation of Defendants in Criminal Cases*, 54 ST. JOHN'S L. REV. 55 (1979); Hyman, *Joint Representation of Multiple Defendants in a Criminal Trial: The Court's Headache*, 5 HOFSTRA L. REV. 315 (1977); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939 (1978); Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211 (1982); Tague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075 (1979); Note, *Conflict of Interests in Multiple Representation of Criminal Co-Defendants*, 68 CRIM. L. & C. 226 (1977); Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369 (1969); *Developments-Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1373-96 (1981).

26. See, e.g., *Wood v. Georgia*, 450 U.S. 261 (1981).

27. See, e.g., *Wheat v. United States*, 108 S. Ct. 1692 (1988).

28. See, e.g., *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987); *United States v. Cancilla*, 725 F.2d 867 (2d Cir. 1984); *United States v. Martinez*, 630 F.2d 361, 363-4 (5th Cir.) cert. denied, 450 U.S. 922 (1981); *United States v. Arredo-Sarmiento*, 524 F.2d 591, 593 (2d Cir. 1975); *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir.) cert. denied, 423 U.S. 1066 (1976); *United States v. Calabria*, 614 F. Supp. 187, 192 (E.D. Pa. 1985); *United States v. Jones*, 623 F. Supp. 110, 113-4 (E.D. Pa. 1983); *United States v. Tocco*, 575 F. Supp. 100, 102 (N.D. Ill.-E.D. 1983); *United States v. Siegner*, 498 F. Supp. 282, 287 (E.D. Pa. 1980); *Matter of Investigative Grand Jury Proceedings on April 6, 1977*, 432 F. Supp. 50, 54 (W.D. Va. 1977); see generally Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227 (1987); Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1 (1983).

29. See, e.g. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-102(A); *United States v. Castellano*, 610 F. Supp. 1151 (S.D.N.Y. 1985); cf. *United States v. Arrington*, 867 F.2d 122 (2d Cir. 1989); *United States v. McKeon*, 738 F.2d 26, 35 (2d Cir. 1984).

30. See, e.g., *Government of the Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3d Cir. 1984); *United States v. Salinas*, 618 F.2d 1092, 1093 (5th Cir.), cert. denied, 449 U.S. 961 (1980); *In re Investigation Before Feb., 1977, Lynchburg Grand Jury*, 563 F.2d 652, 656-57 (4th Cir. 1977); *United States v. Kerlegon*, 690 F. Supp. 541, 545 (W.D. La. 1988).

31. See, e.g., *United States v. Aiello*, 814 F.2d 109, 110 (2d Cir. 1987) ("Because defense counsel are best positioned to know when a conflict exists or will likely develop during the course of trial, the initial responsibility for preventing the erosion of a client's rights rests on the lawyer's shoulders.").



responsibility arises out of the lawyers' codes of professional conduct,<sup>32</sup> which have always emphasized an attorney's duty to represent his client with unswerving loyalty.<sup>33</sup> An attorney is generally enjoined from agreeing to defend a client when, to do so, the attorney would have a conflict of interest which would prevent him from providing an adequate defense.<sup>34</sup>

This is not to say, however, that out of an abundance of caution, an attorney must give up a client whenever there is merely a risk that a conflict of interest will arise. The lawyers' codes recognize the legitimacy of both the attorney's pecuniary interest in securing clients and the interest of individual litigants in receiving the widest choice of counsel. The professional norms attempt to strike a balance between these interests and the interest in providing litigants with adequate representation. The line drawn by the lawyers' codes is a somewhat vague one. Although both the Code of Professional Responsibility and the Model Rules of Professional Conduct define cases in which a lawyer may never serve conflicting interests, their definitions leave substantial room for interpretation.<sup>35</sup>

The lawyers' codes are more clear in defining the procedure that an attorney must follow, when he becomes aware of a potential conflict of interest, in order to accept, or continue in, the representation of a defendant. Defense counsel must develop the facts needed to assess the likelihood that a conflict will develop and the likely impact of the conflict on the representation. He must decline or withdraw from the representation if he determines that he is likely to have a conflict of interest

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32. A responsibility to protect a defendant's right to receive conflict-free representation has also been thought to arise implicitly out of the sixth amendment right to counsel. See, e.g., *United States v. Aiello*, 814 F.2d at 110. See generally Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1081 (1980) (A defense lawyer has a responsibility to protect his client's procedural rights.).

33. All of the codifications of the standards of the legal profession have contained provisions regarding conflicts of interest. See, e.g., CANONS OF PROFESSIONAL ETHICS, Canon 6 ("It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.") (1908). The contemporary codifications of the professional standards deal extensively with conflicts of interest. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-101-5-107 (1972); MODEL RULES OF PROFESSIONAL CONDUCT, Model Rules 1.7 to 1.11 (1983); see also THE AMERICAN LAWYER'S CODE OF CONDUCT, Rules 2.1 to 2.5 (rev. draft, May 1982).

34. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-105(A),(C); MODEL RULES OF PROFESSIONAL CONDUCT, Model Rule 1.7.

35. E.g., DR 5-105(c) of the Model Code of Professional Responsibility allows an attorney to represent multiple clients, with their consent, "if it is obvious that he can adequately represent the interests of each." Similarly, Model Rule 1.7 of the Model Rules of Professional Conduct permits joint representation, upon the consent of both clients, if "the lawyer believes the representation will not be adversely affected" by the potential conflict of interests.

that is flatly forbidden by the prevailing ethical rules. If, on the other hand, the ethical rules permit the representation, either because a conflict is unlikely to arise, or because the conflict is unlikely to impair the quality of counsel's performance, defense counsel must advise his client about the risks that are inherent in the potential conflict. Defense counsel may defend the accused, notwithstanding the potential conflict, if his client gives consent after full disclosure.<sup>36</sup>

### *B. The Trial Judge's Constitutional Responsibility*

For the most part, trial judges rely on defense attorneys to comply with the prevailing standards governing conflicts of interest.<sup>37</sup> In certain circumstances, however, when it becomes apparent that defense counsel may have a conflict of interest, a trial judge has a responsibility to take steps to protect the defendant's constitutional right to independent counsel.

The trial court's responsibility is generally not demanding. When it appears prior to trial that defense counsel has a real or potential conflict of interest, the court has a duty to ascertain whether the accused will make a voluntary and informed decision to waive his right to an independent attorney.<sup>38</sup> Although trial judges engage in varying types of inquiries,<sup>39</sup> the court must ensure at minimum that the accused understands the general risks created by counsel's potential conflict and voluntarily accepts them.<sup>40</sup> If the accused cannot or will not proffer a voluntary and knowing waiver of his sixth amendment right, then defense counsel must be disqualified and the accused given an opportunity to obtain another lawyer.

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36. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Considerations EC 5-15, 5-16; *id.*, DR 5-105(C); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7 and comment (1983).

37. See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335, 346-47 (1980).

38. *Wood v. Georgia*, 450 U.S. 261 (1981); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *United States v. Cirrincione*, 780 F.2d 602, 605 (7th Cir. 1985); *United States v. Taylor*, 657 F.2d 92, 94 (6th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

39. Compare *Gray v. Estelle*, 616 F.2d 801, 803-04 (5th Cir. 1980) (court of appeals, pursuant to its supervisory authority, requires district judges to engage in extensive inquiry); *United States v. Padilla-Martinez*, 762 F.2d 942, 946-49 (11th Cir. 1985); *United States v. Randa*, 669 F. Supp. 1544, 1550-51 (D. Kan. 1987), with *United States v. Roth*, 860 F.2d 1382, 1388 (8th Cir. 1988) ("A judge should inform the defendant of the nature and importance of the right to conflict-free counsel, and ensure that the defendant understands something of the consequences of a conflict and his entitlement to conflict-free counsel, but the waiver is not like the signature on a bond indenture. It is enough that the defendant knows the types of risks at stake and acts 'with open eyes.'"); *United States v. Curcio*, 680 F.2d 881, 890 (2d Cir. 1982).

40. See, e.g., *United States v. Roth*, 860 F.2d 1382 (7th Cir. 1988); *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 437 (7th Cir. 1983).

The trial court is not obliged to accept the defendant's waiver of independent representation. As the Supreme Court recently determined in *Wheat v. United States*,<sup>41</sup> a trial judge may override the defendant's choice of counsel when there is a serious likelihood that defense counsel will have a conflict of interest at trial. The Court recognized that a trial judge has considerable discretion in deciding whether to disqualify a defense attorney under this standard.<sup>42</sup>

## II. THE PROSECUTOR'S ETHICAL RESPONSIBILITY

### A. *The Choice of Nondisclosure*

*United States v. Mitchell*<sup>43</sup> illustrates the dangers of a prosecutor's failure to respond in any way to the risk that defense counsel will have a conflict of interest.

The defendant in *Mitchell* was charged with narcotics offenses including conspiracy to distribute heroin. Shortly before trial, the federal prosecutor obtained the cooperation of an associate of Mitchell named Bluitt. The prosecutor was aware that Bluitt had recently been represented by Mitchell's attorney, West, on criminal charges in state court. As a consequence, when it came time to cross-examine Bluitt, defense counsel might be torn between her duty to preserve the confi-

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41. 108 S. Ct. 1692 (1988). *Accord In re Paradyne Corp.*, 803 F.2d 604, 611 n.16 (11th Cir. 1986); *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986); *United States v. Flanagan*, 679 F.2d 1072 (3d Cir. 1982), *rev'd on other grounds*, 465 U.S. 259 (1984); *United States v. Hobson*, 672 F.2d 825, 828 (11th Cir.), *cert. denied*, 459 U.S. 906 (1982) (the right to counsel of choice "is not absolute . . . and must give way where its vindication would create a serious risk of undermining public confidence in the integrity of our legal system"); *United States v. Phillips*, 699 F.2d 798, 801-02 (6th Cir. 1983) (*overruled on other grounds* in *United States v. Tosh*, 733 F.2d 422 (6th Cir. 1984)); *United States v. Miller*, 624 F.2d 1198 (3d Cir. 1980); *United States v. Provenzano*, 620 F.2d 985 (3d Cir.), *cert. denied*, 449 U.S. 889 (1980); *United States v. Miller*, 613 F.2d 47 (3d Cir.), *cert. denied*, 446 U.S. 937 (1980); *United States v. Dolan*, 570 F.2d 1177, 1184 (3rd Cir. 1978) (quoted with approval in *Wheat v. United States*, *supra*, 108 S. Ct. at 1698-99); *cf. United States v. Reese*, 699 F.2d 803, 805 (6th Cir. 1983) ("The district court must make a careful inquiry, balancing the constitutional right of the defendant to representation by counsel of his choosing with the court's interest in the integrity of its proceedings and the public's interest in the proper administration of criminal justice. . . . A voluntary waiver of this constitutional right, knowingly and voluntarily made, must be honored by the court in the absence of compelling circumstances.").

42. 108 S. Ct. at 1699-1700; *id.* at 1704 n. (Stevens, J., dissenting). I criticize the *Wheat* decision and discuss its implications for future conflict of interest cases, in an article titled "Through a Glass, Darkly": How the Courts See Motions to Disqualify Criminal Defense Lawyers, which is scheduled for publication in October of 1989 by the Columbia Law Review.

43. 572 F. Supp. 709 (N.D. Cal. 1983), *aff'd*, 736 F.2d 1299 (9th Cir. 1984), *cert. denied*, 474 U.S. 830 (1985).

dences and secrets of her former client<sup>44</sup> and her duty to give Mitchell a vigorous defense.<sup>45</sup> Unless Bluit waivered his right to attorney-client confidentiality, West could not impeach Bluit with information learned during the course of representing him. To avoid the use of those confidences, West might be forced to constrict her cross-examination of Bluit, and might thereby deprive her present client, Mitchell, of the zealous advocacy to which he was entitled.

Although it was obvious that using Bluit as a government witness could cause defense counsel to have a conflict of interest, the prosecutor deliberately did not disclose to the defense in advance of trial that Bluit would testify against Mitchell.<sup>46</sup> The prosecutor was motivated primarily by concern for Bluit's safety. The prosecutor believed that Mitchell or others might injure Bluit or interfere with his testimony if they knew he was cooperating with the government.

When the government disclosed in the midst of trial that Bluit would eventually be called as a witness, defense counsel immediately complained that she would be unable to conduct a vigorous cross-examination without disclosing Bluit's confidences. This problem was solved several days later, when Bluit agreed to let West make use of any information that he had previously provided to her during the course of the attorney-client relationship. A new problem, however, was created by Bluit's waiver of the attorney-client privilege. West would now be a potential defense witness. If Bluit had made statements to her which exculpated Mitchell, it might be in Mitchell's interest for her to testify about those statements in order to impeach Bluit. West could not both testify on Mitchell's behalf and represent him at trial.<sup>47</sup> The defense moved for a mistrial in light of this newly created conflict and the trial court granted the motion without opposition from the government.<sup>48</sup>

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44. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101; MODEL RULES OF PROFESSIONAL CONDUCT, Model Rule 1.6.

45. See *infra* note 57 and accompanying text.

46. The government did submit to the trial court, for *in camera* review, a federal agent's declaration which listed the names of more than 200 potential trial witnesses, including Bluit. Although the government did not specifically call the court's attention to the potential conflict that would result if Bluit testified, the declaration might have enabled the trial court to recognize the problem. See *United States v. Mitchell*, 736 F.2d at 1304-05 n.3.

47. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-102(A); *United States v. Castellano*, 610 F. Supp. 1137, 1151 (S.D.N.Y. 1985).

48. A strong argument may be made that the trial judge granted defense counsel's motion prematurely. The court could instead have waited until the completion of Bluit's testimony and then have required West to make an offer of proof regarding her proposed testimony. It may well have turned out that defense counsel had no legally admissible testimony to give on Mitchell's behalf.

Before Mitchell could be re-tried, the defense moved to dismiss the indictment on double jeopardy grounds. Among other things, the defense claimed that the government had been obligated to disclose the potential conflict in advance of trial and that the government had intentionally breached this obligation for the precise purpose of provoking a mistrial.<sup>49</sup> The district court rejected the double jeopardy claim, finding that the prosecution's aim was not in fact to cause a mistrial but simply to protect its witness.<sup>50</sup> Nevertheless, while allowing the trial to begin again, the court did suggest that the prosecution had acted unethically, if not illegally, in failing to apprise defense counsel of the potential conflict of interest. The court concluded that, "[a]lthough several acts of the prosecutors may constitute misconduct, the misconduct was not so blatant that the Government must have intended it to result in mistrial."<sup>51</sup>

The trial court did not explain, however, why the prosecutor had any ethical obligation to alert opposing counsel to the potential conflict of interest. It may be that the court was uncertain about the precise source of the prosecutor's duty to make disclosure, that it considered the proper course of prosecutorial conduct to be obvious already, that it was hesitant to make *ex cathedra* remarks about prosecutorial ethics, or that, out of sympathy for the prosecutor or the government, it was reluctant to condemn the prosecutor's conduct in any greater detail.

The court's reticence may also have reflected its recognition that the prosecutor's failure to make disclosure in this case had a strong basis in a legitimate ethical concern for the safety of government witnesses. This duty to protect witnesses exists wholly apart from the government's interests in ensuring that their testimony will be available at

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49. As a general rule, the double jeopardy clause of the sixth amendment does not bar a retrial after the defendant, on his own mistrial motion, brings about the termination of the initial trial. See, e.g., *United States v. Scott*, 437 U.S. 82, 93 (1978) ("Such a motion . . . is deemed to be a deliberate election on [the defendant's] part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."). There is an exception to this general rule, however, in a case where the prosecutor intentionally acted in a calculated manner with the purpose of provoking the defendant into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 673 (1982) ("the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar of double jeopardy").

50. 572 F. Supp. at 716; 736 F.2d at 1304-05.

51. 572 F. Supp. at 716; see also *id.* at 713. On appeal, however, the Ninth Circuit viewed the record much more charitably and interpreted the district judge's opinion in a manner extremely sympathetic to the prosecution. According to the appellate court, the district judge "conclu[ded] that the withholding of the witnesses' names was justified" by the prosecution's concern for the protection of its witnesses. 736 F.2d at 1304-05 (emphasis added). At best, however, the trial judge concluded simply that the withholding of Bluit's name was motivated by the prosecution's concern for its witnesses.

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trial and that other potential witnesses will cooperate in the future. Along with the right to command the testimony of witnesses<sup>52</sup> comes a reciprocal obligation on the part of the government to take reasonable steps to protect witnesses from unlawful intimidation.<sup>53</sup> Indeed, at times some have argued that prosecutors have not just an ethical obligation to safeguard witnesses, but a legally enforceable duty, and that a prosecutor should be required to provide compensation for injuries that result from her failure to provide reasonable protection.<sup>54</sup> In recognition of the prosecutor's undeniably legitimate concern for the safety of government witnesses,<sup>55</sup> federal law generally permits a prosecutor to withhold the names of government witnesses prior to trial.<sup>56</sup>

Notwithstanding the prosecutor's responsibility to his witnesses, the court in *Mitchell* clearly was correct in recognizing that the prosecutor had a paramount ethical responsibility to alert defense counsel to the potential conflict.<sup>57</sup> This responsibility arises out of general ethical

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52. See, e.g., *Hurtado v. United States*, 410 U.S. 578, 588- 89 (1973); *United States v. Bryan*, 339 U.S. 323, 331 (1950) ("the public . . . has a right to every man's evidence"); *Blair v. United States*, 250 U.S. 273, 281 (1919).

53. The prosecution's duty to protect its witnesses has gained increasing attention in recent years. For example, various states have issued "bills of rights" for crime victims and witnesses which establish a right to be protected from intimidation. See, e.g., Okla. Stat. Ann. tit. 19, § 215.33(A)(2) (West 1988); Wash. Rev. Code Ann. § 7.69.030(3) (Supp. 1988); Wis. Stat. Ann. § 950.04(3) (West 1982). Similarly, the federal Victim and Witness Protection Act of 1982 requires the Attorney General to issue guidelines to ensure, among other things, that witnesses will "routinely receive information on steps that law enforcement officers and attorneys for the Government can take to protect [them] from intimidation." Pub. L. 97-291, Section 6(a)(2). See also ABA Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System (1983).

54. See, e.g., *Barbera v. Smith*, 654 F. Supp. 386 (S.D.N.Y.), *rev'd*, 836 F.2d 96 (2d Cir. 1987); *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985); see also *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988); *Doe v. Civiletti*, 635 F.2d 88 (2d Cir. 1980).

55. See, e.g., M. GRAHAM, WITNESS INTIMIDATION: THE LAW'S RESPONSE 4-5 (1985) (finding that there have been thousands of instances of witness intimidation, including many murders of prosecution witnesses, particularly in organized crime cases).

56. See, e.g., *United States v. Reis*, 788 F.2d 54, 58 (1st Cir. 1986); see generally Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247, 268-71 (1987).

57. Disclosure to the defense attorney alone probably will not suffice in a case such as *Mitchell*. Unless defense counsel withdraws from the representation on her own initiative, her client will have to make the decision whether to seek a new lawyer, and in order to make an informed decision, he will have to be advised about the details of the potential conflict. Moreover, even if the attorney withdraws voluntarily after learning of the potential conflict, her client may be entitled to know the basis for the lawyer's decision. Cf. *United States v. Duklewski*, 567 F.2d 255 (4th Cir. 1977) (defendant was denied right to counsel of choice when judge advised counsel to withdraw based on information that the judge had received from the prosecutor *ex parte*); *In re Taylor*, 567 F.2d 1183, 1189 (2d Cir. 1983) (it was improper for the trial court to rule on the government's disqualification motion *ex parte*, because the defendant was entitled to an opportunity to refute the government's claim).

obligations of prosecutors to the court and to the criminal accused. First, in accord with the prosecutor's responsibility to promote the proper administration of criminal justice,<sup>58</sup> a prosecutor should take reasonable precautions to minimize the risk of needless relitigation.<sup>59</sup> As the *Mitchell* case itself illustrates, there is a substantial possibility that if the defense is not apprised of counsel's conflict of interest until the middle of trial, a mistrial will result. Had she received pretrial disclosure, defense counsel could have advised her client of the potential conflict and the defendant could have obtained a new lawyer before trial commenced, thereby averting the need for a re-trial. As it turned out, the absence of pretrial disclosure did not even serve its intended purpose, since the witness's identity became known well in advance of the eventual retrial.<sup>60</sup>

More importantly, a prosecutor's responsibility to assure the accused a fair trial<sup>61</sup> means, at the very least, that when a prosecutor has exclusive possession of information that the defendant needs to know in order to receive a fair trial, the prosecutor has a duty to disclose that information to the defense.<sup>62</sup> It follows that a prosecutor has an obligation to call opposing counsel's attention to a potential conflict which may impair counsel's performance, so that counsel can take necessary steps to ensure that her client receives adequate representation and, ultimately, a fair trial.

Waiting until trial to make such disclosure may place the defendant in a situation where he must choose to relinquish one or more rights. The defendant cannot obtain a speedy trial and avoid being placed in jeopardy a second time unless he waives his right to an independent attorney and continues to be represented by an attorney with a conflict. On the other hand, if the defendant wants an attorney who has only the

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58. See *supra* note 11 and accompanying text.

59. Cf. *Morris v. Slappy*, 461 U.S. 1, 14-15 (1983).

60. This does not mean that in a case in which the prosecution intends to present the testimony of a defense lawyer's former client, the prosecutor would never achieve the aim of protecting the witness's identity by withholding it until mid-trial. Although the prospect of the former client's testimony will give rise to a potential conflict of interest, it will not always result in an actual conflict. If the potential conflict is sufficiently insubstantial, the defendant may decline to seek a mistrial. In a case such as *Mitchell*, for example, defense counsel may conclude that she does not possess any confidential information that could be used to impeach her former client or that there will be no need to impeach the former client because his testimony will not involve disputed matters. In such a case, defense counsel may reasonably determine that she does not have an actual conflict of interest and that she can adequately defend her client notwithstanding the potential conflict, and the defendant may therefore choose to continue the trial with defense counsel's representation. Cf. *United States v. Jeffers*, 520 F.2d 1256 (7th Cir. 1975).

61. See *supra* note 9 and accompanying text.

62. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

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defendant's interests at heart, he must agree to be tried again at some future date after a new lawyer is called in as a replacement. If the defendant has retained counsel, this will compound the cost of representation.

It would be unfair to purposefully place a defendant in this position. Moreover, even when a prosecutor is well-intentioned, her failure to make timely disclosure creates at least an appearance that she is seeking to obtain an unfair advantage from the defendant's dilemma at trial. To an observer who is unaware of the prosecutor's motivations, it might appear that the prosecutor sought to benefit from defense counsel's conflict in any of a variety of ways. For example, if the defendant continues with the original attorney, the defense may be less vigorous than it would be if counsel did not have a conflict of interest. If, as in *Mitchell*, the defendant moves for a mistrial in order to obtain a new lawyer, the prosecutor may unfairly benefit at a subsequent retrial, since defense counsel may have revealed her theory of the case during her opening statement and cross-examinations.<sup>63</sup>

Although there is a tension between the prosecutor's responsibility to her witnesses and her responsibilities to the defendant and the court, it is clear that, on balance, the latter responsibilities are ordinarily paramount. In other contexts, it has been firmly established that the defendant's right to a fair trial outweighs the government's interest in protecting the identity of vulnerable witnesses.<sup>64</sup> This does not mean that the prosecution may neglect the safety of its witnesses. It simply means that in a case like *Mitchell*, where the government's prospective witness was previously represented by the defendant's lawyer, the prosecution must protect its witness in some way other than by withholding the witness's identity until he is called to testify. The prosecution may place the witness under protection or take other appropriate steps.<sup>65</sup>

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63. *Cf. Brooks v. Tennessee*, 406 U.S. 605 (1972) (striking down a state law which provided that a defendant who wished to testify on his own behalf must take the stand before other defense witnesses).

64. *See, e.g., Roviato v. United States*, 353 U.S. 53, 60-62 (1957) (where "the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [to withhold an informer's identity] must give way"); *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966) ("Tampering with witnesses and subornation of perjury are real dangers, especially in a capital case. But there are ways to avert this danger without denying defense counsel access to eye witnesses to the events in suit").

65. The American Bar Association has suggested a number of steps which may be taken to protect witnesses, including the following:

extra police patrols; temporary or permanent victim/witness relocation; temporary restraining orders requiring the defendant to maintain a specified geographical distance from the victim or witness; police 'hot lines' for intimidation calls; transportation to and



But, except perhaps in the most extraordinary circumstances, defense counsel must be apprised of a potential conflict as soon as possible after indictment, and certainly in advance of trial.<sup>66</sup>

### B. The Choice of Partial Disclosure

*Mannhalt v. Reed*<sup>67</sup> illustrates that simply apprising defense counsel of a potential conflict of interest may not be sufficient.

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from work, the court, etc.; phone disconnect; mail stop and forward services; phone traces; and warning the defendant regarding statutory penalties involved in witness intimidation.

ABA Guidelines for Fair Treatment of Victims and Witnesses in the Criminal Justice System 9 (1983).

66. Cf. *United States v. Cirrincione*, 780 F.2d 620, 625 (7th Cir. 1985) ("Here the government foresaw the potential conflict and appropriately brought it to the court's attention."). Some courts have held that a prosecutor must also apprise defense counsel of a potential conflict that arises during the course of a pre-indictment investigation. See, e.g., *United States v. Turkish*, 470 F. Supp. 903, 909 (S.D.N.Y. 1978); cf. *SEC v. Csapo*, 533 F.2d 7, 11 (D.C. Cir. 1976). See generally Tague, *Multiple Representation of Targets and Witnesses During a Grand Jury Investigation*, 17 AM. CRIM. L. REV. 300 (1980).

A hard case that tests the general rule is the following: Suppose that an individual has agreed to testify against the defendant, the alleged kingpin of a violent narcotics enterprise. Neither the defendant nor his attorney—who formerly represented the witness—are aware of the witness's decision to cooperate with the government. The witness has advised the government that he has a large extended family and that, if the defendant knew of the witness's agreement with the government, the defendant would commit violence against those family members in order to discourage the witness from testifying. However, according to the witness, the defendant would be unlikely to act purely out of vengeance. Therefore, the witness is confident that once he testifies against the defendant, the defendant will not retaliate against his family.

Under these circumstances, the only wholly satisfactory solution is for the prosecutor to convince the witness to waive the attorney-client privilege with respect to his statements to the defendant's lawyer. That would avoid any conflict arising out of defense counsel's duty to preserve the confidences of a former client.

If the witness is unwilling to waive the attorney-client privilege, there are two unsatisfactory alternatives to pretrial disclosure. The first is for the prosecutor to move *ex parte* for defense counsel's disqualification. It is doubtful, however, that a trial judge could grant the motion without allowing defense counsel an opportunity to be heard. See *supra* note 57 (citing cases). Moreover, in the unlikely event that a trial granted the motion, the *ex parte* order might fail to accomplish its purpose of protecting the witness. Depending on the factual context, defense counsel and the defendant might infer that the reason for the disqualification order.

Another alternative would be to seek counsel's disqualification *in camera*, but to permit defense counsel to participate in hearings on the issue on the condition that he not disclose anything about the hearing to his client. This is unsatisfactory for at least two reasons. First, it is unlikely that the prosecutor would trust defense counsel not to make disclosure under such circumstances. Second, it is unlikely that defense counsel would agree to refrain from making disclosure. Defense counsel could plausibly argue that he has an ethical obligation to discuss the matter with his client. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT, Model Rule 1.4. Among other things, the defendant could not properly waive a potential conflict in the absence of disclosure. See *supra* note 36 and accompanying text.

67. 847 F.2d 576 (9th Cir. 1988).

## Her Brother's Keeper

Mannhalt, the defendant, was charged in December 1980 with soliciting other individuals to commit a string of robberies in King County, Washington. The county prosecutor's main witness, Morris, had been arrested on robbery charges two months earlier. After agreeing to plead guilty and cooperate with the prosecution, Morris identified Mannhalt as one of his accomplices. Morris's information led to the discovery of stolen jewelry in a safe in Mannhalt's donut shop.

In the course of pretrial discovery, the defense received a police report from November 1980 which listed twelve items about which Morris had agreed to give information. The eleventh item referred not to the defendant, but to the defendant's lawyer, Kempton. According to the cooperating witness, Kempton had purchased a stolen ring with \$1200 in cash and also had purchased a stolen bracelet.

The witness's accusation posed a potential conflict for the defense attorney. Kempton's personal interest in preventing further revelations (whether or not truthful) regarding his own allegedly criminal conduct might conflict with his client's interest in a vigorous defense. In furtherance of his own penal interests, or simply to avoid embarrassing public disclosures, the attorney might cross-examine the prosecution witness in a perfunctory manner or give unsound advice to his client about whether to plead guilty.<sup>68</sup>

The accusation might cause the defense lawyer to compromise his representation in a second and very different respect, in the event that he was willing to dispute the allegations publicly. Since it is improper for a lawyer to serve as both an advocate and a witness at trial,<sup>69</sup> Kempton could not call himself as a defense witness to rebut Morris's account. If Kempton did not withdraw from the representation, he would deprive Mannhalt of potential impeachment evidence. He might also be forced to limit both his cross-examination of Morris and his arguments to the jury in order to avoid appearing to place his own credibility in issue.<sup>70</sup>

Although Kempton discussed Morris's accusation with his client, he did not tell Mannhalt that, as a result of the accusation, he might have a conflict of interest at trial. Moreover, while recognizing that Kempton had a potential conflict of interest, the state prosecutor did not call the problem to the attention of the court. As a consequence, Mannhalt was never advised either by counsel or by the court that he had a

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68. See *supra* note 27 and accompanying text.

69. See *supra* note 29 and accompanying text.

70. See, e.g., *United States v. Cunningham*, 672 F.2d 1064, 1074 (2d Cir. 1982), cert. denied, 466 U.S. 951 (1984).

right to an attorney who did not have a conflict of interest and he was never called upon to waive that right voluntarily.

At trial, the prosecution called Morris as a witness but questioned him only about Mannhalt, the defendant, and not about Kempton. On cross-examination, nevertheless, Kempton elicited that he had been accused of purchasing stolen jewelry and then attempted to prove that accusation false. In the course of this effort, Kempton became increasingly emotional. He referred to Morris as a liar. Kempton also called on his own wife, who was seated in the courtroom, to comment about her jewelry. As Kempton's questioning became increasingly unusual, the trial judge was led to observe that "[t]hings are coming a little unglued."<sup>71</sup>

Mannhalt was convicted. After appealing unsuccessfully to the state court, he filed a federal habeas corpus petition in which he asserted a number of claims, including that he had been denied his right to counsel's undivided loyalties. Although the federal district judge denied the petition, the Ninth Circuit reversed, holding that Mannhalt must be afforded a new trial, because his trial attorney had an actual conflict of interest which adversely affected the quality of his representation.<sup>72</sup>

At the end of its discussion, the appellate court warned that it is not enough to call a possible conflict of interest to defense counsel's attention, as did the Washington state prosecutor in this case. The prosecutor must also call the potential conflict to the attention of the trial court. The Ninth Circuit noted:

The prosecution here was fully aware before Mannhalt's trial began of Morris' accusation against Kempton. The prosecution, therefore, had ample opportunity to bring the potential conflict to the trial judge's attention and move for disqualification if appropriate. Such a process would also have enabled Mannhalt if he so desired to waive any conflict on the record after adequate warning. We trust that this opinion will ensure a pretrial disposition of such conflict of interest issues in the future.<sup>73</sup>

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71. 847 F.2d at 579.

72. The court found that Kempton's conflict may have caused him to withhold sworn testimony that might otherwise have benefited Mannhalt; it may have caused Kempton to cross-examine Morris in an overly excited manner; it may have affected Kempton's decision not to elicit the defendant's own testimony about Morris's accusation; and it may have discouraged Kempton from pursuing a plea bargain that might have led Mannhalt to implicate Kempton. 847 F.2d at 581.

73. *Id.* at 583-84.

At least three arguments can be made that the Ninth Circuit's prescription is unnecessary and that there was nothing wrong with the prosecution's conduct in the *Mannhalt* case. First, it may be argued that the prosecutor had no duty to initiate a judicial inquiry because he was not responsible for ensuring that the defendant received conflict-free representation. This argument finds some support in *Strickland v. Washington*,<sup>74</sup> the case in which the Supreme Court delineated the scope of the right to effective assistance of counsel. In the course of its determination, the Court observed that "[t]he government is not responsible for, and hence not able to prevent, [defense] attorney errors."<sup>75</sup> It may be argued that this observation reflects the Court's acknowledgement that prosecutors have no responsibility to take steps, such as the initiation of judicial inquiries, when it appears that defense counsel may be making mistakes which will amount to the denial of reasonably effective representation at trial. If interpreted in this manner, the Court's remarks would, at the same time, implicitly absolve prosecutors of any responsibility to initiate an inquiry into defense counsel's potential conflict of interest.

This argument is unpersuasive, however. The Court's observation in *Washington* should be read as merely an acknowledgement that a prosecutor usually cannot know that a defendant is receiving ineffective assistance and, for that reason, a prosecutor usually cannot do anything to remedy the problem. It is often hard for a prosecutor to identify ineffective assistance of defense counsel with any degree of certainty during the course of a trial, in part, because the standard of attorney competence is a very general one.<sup>76</sup> A prosecutor cannot confidently identify the point at which defense counsel's representation had become constitutionally defective. Moreover, conduct which seems incompetent in light of information known to the government may nevertheless be reasonable in light of other information known to defense counsel, including information provided to counsel in confidence by his client.<sup>77</sup> But this does not mean that a prosecutor may remain silent in those rare cases when defense counsel's inadequacy is obvious. As the Court recognized in *Cuyler v. Sullivan*, "[t]he right to counsel prevents the State from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance."<sup>78</sup> Therefore, when it becomes apparent that defense counsel may be denying the

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74. 466 U.S. 668 (1984).

75. *Id.* at 693.

76. *Strickland v. Washington*, 466 U.S. at 689 (1984).

77. *See id.* at 691.

78. 446 U.S. at 344.

accused adequate legal assistance, the prosecutor, as a representative of the State, should take reasonably available steps to remedy the problem.<sup>79</sup>

A second argument in defense of the prosecutor's conduct in *Mannhalt* is that even if the prosecutor had some duty to protect the defendant, he adequately carried out that responsibility by apprising the defense attorney of the facts giving rise to a potential conflict of interest. It was reasonable for the prosecutor to expect defense counsel to recognize the ethical problem on his own and to take appropriate action. The prosecutor was entitled to presume that the defense attorney subsequently continued in the representation, notwithstanding the potential conflict, because counsel had obtained the defendant's knowing and voluntary consent to a potentially compromised defense.

This argument finds substantial support in a number of Supreme Court decisions in which it was presumed that defense attorneys will comply with the ethical rules regarding conflicts of interest.<sup>80</sup> For

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79. Although this obligation is not recognized by either the Code or the Model Rules, it has been recognized by commentators and acknowledged by some prosecutors. See Freedman, *The Professional Responsibility of Prosecuting Attorneys*, 55 GEO. L.J. 1030, 1039-40 (1967); see also Fisher, *supra* note 7, at 222-223. It has also been included in THE AMERICAN LAWYER'S CODE OF CONDUCT (rev. draft, May 1982). Rule 9.9 of that code provides: "A lawyer serving as public prosecutor, who knows that a defendant is not receiving or has not received effective assistance of counsel, shall promptly advise the court, on the record when possible." The Lawyer's Code of Conduct, which was proposed by the American Trial Lawyer's Association as an alternative to the Model Rules, has not been adopted in any state, however.

This responsibility has also been recognized by some courts. For example, it was recognized more than four decades ago in *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945), one of the earliest decisions concerning the criminal defendant's constitutional right to effective representation of counsel. In that case, the D.C. Circuit set forth the "farce and mockery" standard, *id.* at 669, which was later rejected in *Strickland v. Washington*, 466 U.S. 668 (1984), as the standard for reviewing the adequacy of defense counsel's performance at trial. In giving content to the earlier standard, the court stated in *Diggs v. Welch* that "the absence of effective representation must be strictly construed" to "mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it." 148 F.2d at 670 (emphasis added). *Accord* United States ex rel. Darcy v. Hardy, 203 F.2d 407, 427 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953). In more recent years, however, members of the D.C. Circuit have expressed some skepticism about the extent of a prosecutor's or a trial judge's responsibility to ensure the adequacy of defense counsel's performance. See *United States v. Decoster*, 624 F.2d 196, 208-09 (D.C. Cir. 1976) (Leventhal, J.); *id.* at 228 (MacKinnon, J.); see also *Mitchell v. United States*, 259 F.2d 787, 793 (D.C. Cir. 1958).

80. See, e.g., *Burger v. Kemp*, 107 S. Ct. 3114, 3120 (1987) ("we generally presume that the lawyer is fully conscious of the overarching duty of complete loyalty to his or her client"); *Cuyler v. Sullivan*, 446 U.S. at 347 ("trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel"); but see *Wheat v. United States*, 108 S. Ct. at 1699 ("Nor is it amiss to observe that the willingness of an attorney to obtain such waivers [of the right to individual counsel] from his clients may bear an inverse relationship to the care with which he conveys all the necessary information to them.").

example, in *Cuyler v. Sullivan*, the Supreme Court noted that trial judges may presume that defense lawyers act ethically.<sup>81</sup> If this is true, then why can't prosecutors indulge a similar presumption? Two commentators, Margolin and Coliver, have suggested that by calling upon the trial court to inquire into defense counsel's potential conflict of interest, a prosecutor unfairly denies defense counsel the "presumption of professional integrity to which lawyers are usually entitled."<sup>82</sup>

This argument is flawed, however, because as the *Mannhalt* case shows, the presumption is not a conclusive one. Not every defense attorney will recognize his ethical obligation or act accordingly when faced with a potential conflict.<sup>83</sup> Particularly in a case where, after receiving notice of a potential conflict, the defense attorney himself fails to apprise the court of the problem, there is good reason to believe that the attorney is not functioning consistently with the standard of ethical practice usually expected of defense lawyers.<sup>84</sup> Therefore, notwithstanding the presumption recognized by the Supreme Court in *Sullivan*, disclosure to defense counsel alone does not sufficiently guarantee that the defendant will receive conflict-free representation.

Finally, it may be argued that it is proper for a prosecutor to refrain from initiating a judicial inquiry into defense counsel's potential conflict of interest, because the subsequent inquiry may be unfair, or at least appear to be unfair, to the defendant. As Margolin and Coliver point out, a judicial inquiry into defense counsel's potential conflict may damage the defendant's relationship with his attorney while affording the prosecutor unfair access to confidential information and defense strategy.<sup>85</sup>

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81. See *supra* note 37 and accompanying text.

82. Margolin & Coliver, *supra* note 18, at 229-30.

83. See, e.g., *Zuck v. State of Alabama*, 588 F.2d 436, 438 (5th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979) (defense attorney knew of facts giving rise to conflict of interest but never advised the defendant); *Castillo v. Estelle*, 504 F.2d 1243, 1244-45 (5th Cir. 1974).

84. See *Cuyler v. Sullivan*, 446 U.S. at 346 (defense counsel has an obligation "to advise the court promptly when a conflict of interest arises during the course of trial"); *Holloway v. Arkansas*, 435 U.S. at 485-86 ("defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem").

85. Margolin & Coliver, *supra* note 18, at 229-30. This argument also finds support in *Strickland v. Washington*, 466 U.S. 668 (1984), in which the Court made clear that the standard of attorney competence which it set out was intended, in part, to discourage inquiries into the quality of defense counsel's performance. The Court explained:

Counsel's performance and even willingness to serve could be adversely affected [by the proliferation of hearings concerning the effectiveness of counsel]. Intensive scrutiny of counsel . . . could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

The answer to this argument is that the fault, if any, lies not with the prosecutor who makes disclosure but with the trial judge who conducts the subsequent inquiry. By notifying the trial judge, the prosecutor does not compel the court to undertake an intrusive inquiry, but simply allows the court to carry out its own responsibilities as it views them. An inquiry sufficient to protect the defendant can be undertaken without impugning defense counsel's competence and without requiring the disclosure of otherwise confidential information. For example, the procedure prescribed by the Second Circuit contemplates the appointment or retention of a second lawyer to advise the defendant about the risks created by the potential conflict.<sup>86</sup> Although the trial judge must subsequently inquire into the defendant's understanding of these risks and the defendant's willingness to undertake them, this procedure does not necessitate detailed public disclosure of defense strategy or defendant confidences. If this procedure endangers the defendant's relationship with his attorney at all, the danger pales in comparison to the risk that the defendant will be denied adequate representation as a result of an unexamined conflict.

On balance, then, the Ninth Circuit in *Mannhalt* has the better of the argument. Each of the ethical obligations which require disclosure to opposing counsel should also require disclosure to the court. First, the duty to avoid the relitigation of criminal cases requires a prosecutor to take the small step of alerting the court to defense counsel's potential conflict. If the court had been alerted in the *Mannhalt* case, it would have had the opportunity to conduct a hearing at which Mannhalt would have been advised of the potential conflict and then given the choice between securing another lawyer or waiving his right to counsel's undivided loyalties. This would almost certainly have averted the suc-

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*Id.* at 678-79. Undoubtedly, inquiries into counsel's competence which are conducted before or during trial will pose an even greater threat to the attorney-client relationship than the type of post-trial hearing which the Court sought to discourage in *Washington*. It has been argued that pretrial inquiries into counsel's ability to provide conflict-free representation creates similar problems. Such inquiries may undermine the relationship of trust between a defendant and his attorney, as well as discourage other lawyers from representing similarly situated defendants in future cases. At the same time, it has been said that by initiating a hearing at which counsel must defend his conduct, a prosecutor would unfairly compel the attorney to make factual disclosures of evidence to which the prosecution might not otherwise be entitled. Margolin & Coliver, *supra* note 18, at 229-30, 254.

For a recent, extreme description of how prosecutors, as part of a pattern of prosecutorial misconduct, wrongfully insinuated that defense attorneys had conflicts of interest, see *United States v. Shuck*, 705 F. Supp. 1177 (N.D. W.Va 1989).

86. *United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1982); see *United States v. Unger*, 700 F.2d 445, 453-54 (8th Cir. 1983); *United States v. Garcia*, 517 F.2d 272, 276 (5th Cir. 1975); *United States v. Foster*, 469 F.2d 1, 4 (1st Cir. 1972).

cession of post-trial proceedings which culminated in the reversal of Mannhalt's conviction and the need for a new trial.

Similarly, the Ninth Circuit's prescription is warranted by the prosecutor's ethical obligation to give the accused a fair trial. This includes an affirmative obligation to ensure that the defendant's constitutional rights are protected. When a prosecutor sees that a defendant is being denied the right to independent representation, the prosecutor has a duty to take steps to correct the problem, whether or not it is of her own making. This means that if the defense attorney has failed to withdraw from the representation after being apprised of a potential conflict of interest, the prosecutor has an ethical obligation to initiate judicial inquiries in order to ensure that the defendant either waives the right to conflict-free representation or obtains an attorney who has no conflict.<sup>87</sup>

### C. The Choice of Full Disclosure

*United States v. Iorizzo*<sup>88</sup> illustrates that apprising the court of defense counsel's potential conflict may not be sufficient in itself to satisfy the prosecutor's ethical responsibility.

The defendant in *Iorizzo* owned a company which distributed motor fuel. Among other allegations, he faced mail fraud charges arising out of his alleged attempt to evade state gasoline taxes by filing fraudulent tax returns. The government's chief witness, James Tietz, was the corporate employee who had prepared the tax returns. Several years earlier, Tietz had testified before the State Tax Commission in connection with a related tax investigation. He had been represented at that proceeding by Iorizzo's trial attorney.

The federal prosecutor recognized well in advance of trial that defense counsel had a potential conflict of interest because of his prior representation of Tietz. At a pretrial conference, the prosecutor raised

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87. This ethical obligation has been expressly recognized on a number of occasions. For example, in *United States ex rel. Vriner v. Hedrick*, 500 F. Supp. 977, 983 (C.D. Ill. 1980), two brothers were represented by a single attorney at a criminal trial in Illinois state court. The prosecutor did not call the potential conflict to the attention of either the defense attorney or the court. Although both defense counsel and the court should have recognized the potential conflict on their own, the District Court stated that "under the circumstances presented in this case, a prosecutor should call to the attention of the court and opposing counsel the possibility of prejudicial conflict. A prosecutor has an obligation to deal fairly and see that a defendant's constitutional rights are not violated." *Id.* at 983. See also *United States v. Holley*, 826 F.2d 331, 333 (5th Cir. 1987); *People v. Mattison*, 67 N.Y.2d 462, 469 (1986); Lowenthal, *supra* note 28, at 36. But see *Cerro v. United States*, 872 F.2d 780, 787 (7th Cir. 1989) (prosecutor has no constitutional duty to advise the trial court that defense counsel has a potential conflict of interest).

88. 786 F.2d 52 (2d Cir. 1986).



the problem with the district judge and suggested that "the Court is forced to rule now whether [defense counsel] can continue representing this client."<sup>89</sup> Unimpressed with the problem, the trial judge said he would not conduct an inquiry unless the government formally moved in writing to disqualify the defense lawyer. The prosecution chose not to do so and the trial went forward.

Since the government's case at trial hinged almost entirely on Tietz's testimony, it was essential for defense counsel to discredit Tietz. Toward that end, defense counsel sought to exploit the fact that, in his earlier testimony before the State Tax Commission, Tietz had neither implicated Iorizzo nor conceded that the tax returns were false. But on cross-examination, when defense counsel began to refer to Tietz's earlier testimony, the prosecutor objected, arguing that defense counsel's conflict of interest made any such questioning improper. The trial judge now realized that defense counsel had a conflict, but decided to let the cross-examination proceed, reasoning that the defense attorney's "professional integrity" was his own concern, not the court's. The judge warned defense counsel, however, that "if . . . an appropriate [disciplinary] committee feels that what you are doing here is wrong, then do not indicate that this Court condoned the cross-examination."<sup>90</sup>

The next morning, upon further reflection, defense counsel decided not to question Tietz about his prior testimony. At that point, the prosecutor urged the court to establish on the record that Iorizzo was satisfied with defense counsel's representation even though counsel had a conflict of interest. This time, the trial judge agreed on the need for an inquiry, but instead of conducting it himself, he allowed defense counsel briefly to question his client in open court.<sup>91</sup>

On appeal from the conviction that followed, Iorizzo argued that he had been denied the assistance of counsel free from conflicts of interest. The Court of Appeals agreed, finding that trial counsel's "decision to forgo inquiry into Tietz's prior testimony was not the result of a tactical judgment by a conflict-free lawyer that such evidence would not be helpful to Iorizzo. . . . The decision to forgo inquiry was . . . made solely to protect the interests of defense counsel."<sup>92</sup> The appellate court further found that Iorizzo had not effectively waived his right to

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89. *Id.* at 54-55. The appellate court's opinion does not disclose defense counsel's reaction to the prosecutor's argument.

90. *Id.* at 55.

91. *Id.* at 56-57.

92. *Id.* at 58.

conflict-free representation, because the trial judge had failed to follow the specific procedures previously established by the Second Circuit. The trial judge should have personally advised Iorizzo of the dangers arising from defense counsel's conflict, given Iorizzo an adequate opportunity to consider those dangers, and then elicited from Iorizzo in his own words that he understood the dangers and freely accepted them.<sup>93</sup>

As a "final note," the court of appeals blamed the prosecutors for the reversal of Iorizzo's conviction. In the court's view, it was not good enough that the prosecutors had apprised the trial judge of defense counsel's potential conflict in advance of trial. Chastising the prosecutors for failing to take the further step of filing a pretrial disqualification motion, the court stated:

The reversal here is the direct result of the prosecution's using defense counsel's conflict of interest as a means of affecting the evidence going before the jury instead of moving for his disqualification before trial. The prosecutors here were aware of defense counsel's conflict of interest at an early stage and were invited by the district judge to make a disqualification motion in writing. We trust that this decision will ensure that a pretrial disposition of such issues will occur in the future.<sup>94</sup>

At first glance, it is hard to understand the appellate court's decision to single out the prosecutors for blame. Both defense counsel and the trial judge were equally aware of the potential conflict of interest before trial began. The defense attorney had ample opportunity, in accordance with well-established ethical rules,<sup>95</sup> either to secure Iorizzo's knowing and voluntary consent or to withdraw from the representation. Similarly, the trial judge had ample opportunity to conduct an inquiry, in accordance with well-established procedures,<sup>96</sup> to ascertain whether Iorizzo was willing to waive his right to an attorney with undivided loyalties. One would expect under these circumstances that, having disregarded courses of conduct which are clearly prescribed by the law, the defense attorney and the court would bear equal, if not greater, responsibility for bringing about the reversal of Iorizzo's conviction.

Moreover, even assuming that the problem was largely of the prosecution's making, it is unclear whether the Second Circuit has prescribed the right solution. Although the *Iorizzo* court made it clear that

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93. *Id.* at 59 (citing *United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1980)).

94. *Id.*

95. See *supra* note 36, and accompanying text.

96. See *supra* note 40, and accompanying text.

the prosecutors should have filed a written disqualification motion, the court did not make it clear why the prosecutors should have done so. On the one hand, the court may have meant that the prosecutors had some responsibility to press vigorously for defense counsel's disqualification. On the other hand, the court may have meant that the prosecutors should have filed a motion as a device for calling the trial judge's attention to his responsibility to conduct a hearing at which the defendant would have an opportunity to make a knowing and voluntary waiver on the record.

If the court meant that the prosecutor should have sought disqualification, even if Iorizzo was willing to make a knowing and voluntary waiver, then its dicta was not well thought out. In this case, a disqualification motion could easily have been perceived as a tactical weapon intended by the prosecutor to unfairly deprive the defendant of an effective advocate. Defense counsel had represented Iorizzo and Iorizzo's employees for a number of years. Over time, the attorney undoubtedly had developed a detailed knowledge of the workings of Iorizzo's business which would be useful in defending Iorizzo on the pending criminal charges. Moreover, a relationship of trust and confidence most likely had developed between Iorizzo and his lawyer. These facts would support a perception that the prosecutor's attempt to disqualify defense counsel was wrongfully motivated, and the perception would be compounded by the fact that the trial judge, whose obligation to ensure the defendant a fair trial is at least as great as that of the prosecutor, saw no need to initiate a hearing when apprised of the potential conflict.

If the disqualification motion were meant simply to be an attention-getting device which would be withdrawn after the defendant made an effective waiver of conflict-of-interest claims, it would still subject the prosecutor to criticism, since it would be perceived by the public as an attempt to deprive the defendant of his chosen counsel.<sup>97</sup> Nevertheless, the court correctly recognized that when defense counsel has a potential conflict, the prosecutor does not necessarily discharge his ethical

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97. It is hard to see why the prosecutor in *Iorizzo* should have been required immediately to file a formal motion, thereby placing himself in the position of appearing to act unfairly, unless, as the Second Circuit read the trial record, the district judge was clearly unwilling to conduct an inquiry in the absence of a formal motion. At least in the first instance, it should have been sufficient for the prosecutor to call the trial judge's attention to *United States v. Curcio*, 680 F.2d 881, 888-90 (2d Cir. 1982), which established the judge's duty, independent of a disqualification motion, to initiate an inquiry into defense counsel's potential conflict.

responsibility merely by making pretrial disclosure to defense counsel and the court. In many cases, defense counsel does not withdraw after he is apprised of the potential conflict and the trial judge fails to initiate a hearing to determine whether the defendant will waive conflict of interest claims.<sup>98</sup> In more unusual cases, such as *Iorizzo*, a trial judge will refuse to conduct an adequate hearing in the absence of a formal motion.<sup>99</sup> In cases such as these, the prosecutor must move to disqualify counsel, if only as a device to encourage the trial judge to resolve the problem in advance of trial. Otherwise, the defendant may involuntarily and unknowingly be forced to go to trial with an attorney whose loyalties are divided, and by the time the trial court or an appellate court recognizes the problem, a new trial may be required. A prosecutor's ethical responsibilities both to the court and to the defendant require him to take every available step to avert these possibilities, even if that means exposing himself to undeserved criticism from the defense.

#### *D. The Choice of a Disqualification Motion*

*Wheat v. United States*<sup>100</sup> illustrates the ethical perils of seeking defense counsel's disqualification.

Wheat and others allegedly conspired to distribute thousands of pounds of marijuana. While Wheat awaited trial, two of his co-defendants received excellent representation from an attorney named Iredale.<sup>101</sup> The first, Gomez-Barajas, obtained an acquittal on the narcotics charges as well as an extremely lenient plea offer with respect to other, unrelated charges. The second co-defendant, Bravo, was permitted to plead guilty to less serious narcotics charges than the ones contained in the indictment. Having been impressed by the quality of Iredale's work, Wheat asked Iredale to defend him in place of, or in addition to, his original trial lawyer.

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98. See, e.g., *Zuck v. Alabama*, 588 F.2d 436, 438 (5th Cir.), cert. denied, 444 U.S. 833 (1979) (trial judge was aware of potential conflict but did not initiate an inquiry); *United States v. Alvarez*, 580 F.2d 1251, 1260 (5th Cir. 1978); *Castillo v. Estelle*, 504 F.2d 1243, 1244-45 (5th Cir. 1974).

99. See *Wood v. Georgia*, 450 U.S. at 272-73.

100. 108 S. Ct. 1692 (1988).

101. Iredale has been recognized as one of the country's top criminal defense lawyers, and has argued twice before the Supreme Court. See S. NAIFEH & G. SMITH, *THE BEST LAWYERS IN AMERICA* 406 (1987). See *United States v. Quinn*, 106 S. Ct. 1623 (1986); *United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982).

Although Iredale agreed to defend Wheat, the prosecutor objected on the ground that Iredale would have a conflict of interest. The prosecutor foresaw two possible conflicts. First, the prosecutor might call Bravo as a witness against Wheat. Iredale's loyalty to Bravo might impair Iredale's ability to conduct an effective cross-examination. Second, Gomez-Barajas's plea might be rejected, he might go to trial, and Wheat might be called as a witness against Gomez-Barajas. If all those things occurred, Iredale might not be able to cross-examine Wheat effectively.

Although all three defendants agreed to waive any claims arising out of the potential conflicts of interest, the trial judge refused to allow Iredale to enter the case on behalf of Wheat. The judge rejected defense counsel's assertion that a conflict was extremely unlikely to arise and that, in any event, a trial court should uphold a defendant's waiver of conflict-of-interest claims. Following Wheat's conviction, both the Ninth Circuit and a majority of the Supreme Court determined that the trial judge had acted within his discretion in refusing to permit the substitution of counsel. In an opinion for the Court, Chief Justice Rehnquist concluded that, upon finding a "serious potential for conflict," a trial judge has broad latitude to disqualify a defendant's chosen attorney in order to ensure that the trial is conducted within the ethical standards of the legal profession and that the trial appears fair to all who observe it.<sup>102</sup>

The prosecutor's opposition to defense attorney Iredale's representation was sharply criticized by Justice Marshall in a dissenting opinion. While agreeing with the majority that "a trial court may . . . reject a defendant's counsel [when] a serious conflict may indeed destroy the integrity of the trial process,"<sup>103</sup> Justice Marshall concluded that in Wheat's case the potential conflict was an insubstantial one which had probably been manufactured by the prosecutor in order to avoid having to face a skillful opponent. After pointing out that the testimony of Wheat's co-defendant, Bravo, was virtually worthless to the government, since Bravo was unable to implicate Wheat in the alleged conspiracy, and, indeed, had never even met or heard of Wheat before the indictment, Justice Marshall noted:

The prosecutor's decision to use Bravo as a witness was an 11th-hour development. Throughout the course of plea negoti-

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102. *Wheat*, 108 S. Ct. at 1699-1700.

103. *Id.* at 1700.

ations with Bravo, the prosecutor never had suggested that Bravo testify at petitioner's trial. At Bravo's guilty-plea proceedings, when Iredale notified the District Court of petitioner's substitution motion, the prosecutor conceded that he had made no plans to call Bravo as a witness. Only after the prosecutor learned of the substitution motion and decided to oppose it did he arrange for Bravo's testimony . . . . Especially in light of the scarce value of Bravo's testimony, this prosecutorial behavior very plausibly may be viewed as a maneuver to prevent Iredale from representing petitioner at trial. Iredale had proved to be a formidable adversary; he previously had gained an acquittal for the alleged kingpin of the marijuana distribution scheme. . . . The prosecutor's decision to call Bravo as a witness may well have stemmed from a concern that Iredale would do an equally fantastic job at petitioner's trial. As the Court notes, government maneuvering of this kind is relevant to a trial court's decision as to whether to accept a criminal defendant's chosen counsel. The significant possibility that the prosecutor was engaging in such bad-faith conduct provides yet another reason to dispute the Court's resolution of the case.<sup>104</sup>

Justice Marshall's observations point up the difficult ethical problem that confronts prosecutors in cases, such as *Wheat*, where a defendant is willing to waive claims arising out of defense counsel's conflict of interest. It is not clear under what circumstances a prosecutor may appropriately seek defense counsel's disqualification in the face of the defendant's proffered waiver. The majority in *Wheat* conceded Justice Marshall's point that it would have been improper for the prosecutor "to 'manufacture' a conflict in order to prevent [the] defendant from having a particularly able defense counsel at his side."<sup>105</sup> Apparently,

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104. *Id.* at 1703 n.3.

105. *Id.* at 1699. Most would undoubtedly agree that even where defense counsel's conflict is real and substantial and not of the prosecutor's making, it would be improper for a prosecutor to use a disqualification motion for the purpose of eliminating a capable adversary or for any other purely tactical purpose, such as to delay the trial or to put the defendant to the expense of retaining a new lawyer. See *United States v. Diozzi*, 807 F.2d 10, 13 (1st Cir. 1986) ("while the government may have gained some tactical advantage by forcing [the defendant's attorneys] to appear as government witnesses rather than as advocates for the defense, the government may not infringe upon the right to counsel of choice for such an improper purpose"); cf. *In re Taylor*, 567 F.2d 1183, 1191 (2d Cir. 1977); *In re Rook*, 276 Or. 695, 556 P.2d 1351 (1976). The prosecutor stands on different footing from civil practitioners in this respect. In civil cases disqualification motions are often filed for purely tactical reasons, and although courts occasionally respond with irritation, they usually do not question the ethical propriety of these motions, see, e.g., *Cox v. American Cast Iron Pipe Co.*, 847 F.2d 725, 732 (11th Cir. 1988), except where the motions are entirely without foundation. See, e.g., *Minerals Engineering Co. v. Wold*, 575 F. Supp. 166 (D. Colo. 1983).

in the majority's view, the trial judge could properly have found that the prosecutor had a legitimate motivation for opposing Iredale's appearance in the case. The majority opinion, however, did not say what that legitimate motivation might have been. The majority's silence on this score suggests that it, too, had some doubt about the prosecutor's motives, but that, unlike the dissent, it was willing to give the prosecutor the benefit of the doubt, in accordance with a presumption that prosecutors generally act ethically.<sup>106</sup>

The *Wheat* decision leaves open two important questions concerning the prosecutorial use of disqualification motions. The first question is primarily procedural: Do prosecutors have a responsibility not simply to avoid manufacturing conflicts of interest, but also to cooperate affirmatively to reduce the need to disqualify defense counsel when a conflict of interest was not improperly manufactured? The second question is more substantive: What reasons are legitimate for seeking defense counsel's disqualification notwithstanding the defendant's proffered waiver of conflict-of-interest claims? By its silence, the Court leaves it to prosecutors, at least in the first instance, to answer these questions for themselves.

### III. PROPOSED GUIDELINES GOVERNING DISQUALIFICATION MOTIONS

#### A. *The Need for Published Guidelines*

The judicial decisions concerning conflicts of interest adequately describe the initial steps that a prosecutor must take upon learning of defense counsel's potential conflict of interest. In general, the prosecutor must ensure that the defendant either secures independent counsel or waives his right to independent counsel after a judicial inquiry on the record. The prosecutor's responsibility to initiate judicial proceedings prior to trial is implicit in both the prosecutor's duty to promote the

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106. This was not the first time that a federal prosecutor has been given the benefit of the ethical doubt. Like defense attorneys, prosecutors are generally presumed to act ethically. See, e.g., *Town of Newton v. Rumery*, 107 S. Ct. 1187, 1193-94 (1987) (plurality opinion of Powell, J.); *Singer v. United States*, 380 U.S. 24, 37 (1965) ("Because of this confidence in the integrity of the federal prosecutor, [Fed.R.Crim.P.] 23(e) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose."). This presumption is not irrebuttable, however, and criminal defendants may be entitled to relief in cases where they can demonstrate that the prosecutor has acted out of improper motivations. See, e.g., *Blackledge v. Perry*, 417 U.S. 21 (1974); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Oyler v. Boles*, 368 U.S. 448 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see generally Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127 (1983).

fairness of criminal proceedings and the prosecutor's duty to promote the efficiency of criminal justice. Unless defense counsel's potential conflict is recognized and waived by the defendant in advance of trial, the defendant may be entitled to assert either during or after trial that his Sixth Amendment right to conflict-free representation was abridged and thereby obtain a new trial.

The courts have not provided adequate guidance, however, with respect to the steps that a prosecutor should take when the defendant is willing to waive conflict of interest claims and proceed to trial with an attorney who may have a conflict of interest. In many cases, prosecutors have moved to disqualify opposing counsel based on a professed concern for the interests of the defendant or the legal system. Like the Supreme Court in *Wheat*, the lower federal courts have not addressed whether, before seeking to override a defendant's waiver, a prosecutor has a duty to cooperate to eliminate defense counsel's potential conflict of interest. Nor have courts addressed the propriety of seeking defense counsel's disqualification when the defendant is willing to waive conflict of interest claims.

One might be skeptical whether in most cases prosecutors are actually acting out of proper motives when they ask the trial court to override a defendant's proffered waiver.<sup>107</sup> Cause to suspect a prosecutor's motives inevitably arises out of the prosecutor's adversarial role. Whereas a decision by a trial judge *sua sponte* to disqualify defense counsel might be accepted as fair because of the perception that the trial judge is neutral and detached, a prosecutor's decision to file a disqualification motion in precisely the same case could easily be viewed as unfair simply because the government may stand to gain from the hearing on the motion or from disqualification itself. An additional cause for skepticism is that few if any prosecutor's offices have published guidelines governing when to make a disqualification motion. The virtually unfettered discretion given to prosecutors, combined with the absence of any extended discussion of the problem by the lawyers' codes and judicial opinions, contributes to the perception that motions to disqualify are being filed for the wrong reasons.

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107. Cf. Wolfram, *supra* note 16, at 318 n.21 ("The motives of a prosecutor seeking, apparently altruistically, to obtain separate representation for grand jury targets, might be explicable on much less elegant grounds as an attempt to break apart a solid front in order to play one witness off against another."); Margolin & Coliver, *supra* note 18, at 229 ("It is the authors' opinion, based on familiarity with more than a dozen cases in which such disqualification inquiries have been filed, that the government's primary motive in bringing such motions is to disqualify the most competent lawyers and firms, with little regard for their reputation for ethical practice."); Lowenthal, *supra* note 28, at 55 ("There are reasons to believe that some motions to disqualify counsel in criminal cases are also filed for tactical advantage . . .").



In light of the prosecutor's duty not just to act fairly but also to promote the appearance that criminal proceedings are fair, prosecutors' offices have a responsibility to minimize the impression that disqualification motions are being filed for improper reasons. The obvious way for prosecutors' offices to do that would be for them to issue guidelines which govern the filing of disqualification motions.<sup>108</sup> Such guidelines should address both the procedural question and the substantive question left unanswered by *Wheat*.

### *B. The Prosecutor's Duty to Cooperate in Eliminating Conflicts*

As both the majority opinion in *Wheat* and Justice Marshall's dissenting opinion recognized, a prosecutor often has an opportunity to "manufacture" conflicts of interest which could form the basis for disqualifying defense counsel. For example, the prosecutor might call defense counsel's former client as a witness, not because the witness's testimony is particularly useful, but out of a motivation to create a conflict between counsel's duty to conduct a vigorous cross-examination and his duty to preserve the former client's confidences. Or, the prosecutor might initiate a criminal investigation of defense counsel, not because she believes that there are genuine questions concerning the lawfulness of the attorney's conduct, but out of a motivation to create a conflict between the defense attorney's duty to his client and his personal interest. It is unquestionably improper to call witnesses or to initiate investigations for these purposes.

A more difficult question is presented when, even though the potential conflict was not deliberately created by the prosecutor, it is within the prosecutor's power to reduce the need to disqualify defense

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108. See STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE, § 3-2.5(a) (1979) ("Each prosecutor's office should develop a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office."); see also Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Beck, *The Administrative Law of Criminal Procedure: The Development of Prosecutorial Policy*, 27 AM. U.L. REV. 310, 374-76 (1978); Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 401 (1976); Vorenberg, *Decent Restraint on Prosecutorial Discretion*, 94 HARV. L. REV. 1521, 1562 (1981); White, *A Proposal for the Reform of the Plea Bargaining Process*, 191 U. PA. L. REV. 439, 457-58 (1971); cf. UNITED STATES ATTORNEYS' MANUAL, § 9-2.161(a) (internal guidelines governing the issuance of a subpoena to attorneys for information relating to their clients).

In the context of fourth amendment challenges to government searches, courts have recognized on numerous occasions that the implementation of internal guidelines which constrain the government's exercise of discretion may justify otherwise illegal conduct. See, e.g., *Illinois v. Lafayette*, 462 U.S. 640 (1983) (upholding search of arrested person's belongings which was conducted pursuant to "standardized inventory procedures"); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979).

counsel. Under such circumstances, does a prosecutor have an obligation to take steps to reduce or eliminate the need to disqualify defense counsel? It would be reasonable for prosecutors to assume an ethical obligation to take such steps insofar as it is possible to do so without imperiling legitimate government interests. The duty to "give those accused of crime a fair trial"<sup>109</sup> should encompass a duty to accommodate a defendant's constitutionally recognized interest in counsel of choice, at least where no independent government interests would be compromised in the process.

In some cases a prosecutor can reduce the need for disqualification simply by making pretrial disclosure of information that would not ordinarily be disclosed until the trial began. For example, suppose that the prosecutor advises defense counsel and the trial judge that she plans to call defense counsel's former client as a witness. The court in turn initiates an inquiry to determine whether to disqualify defense counsel either because of the magnitude of the potential conflict or because the defendant will not waive the potential conflict. As the majority recognized in *Wheat*, it is difficult for a judge in this pre-trial context to evaluate the nature and dimensions of the potential conflict.<sup>110</sup> A conservative trial judge might be disposed to disqualify the defense attorney in the absence of information that demonstrates that the potential conflict is not a serious one.

In such a case, the prosecutor ordinarily ought to turn over any information she possesses that would weigh in favor of upholding the defendant's choice of counsel. For example, if the government's proffer demonstrates that the witness will testify concerning matters that are essentially undisputed, there may be no need for defense counsel to impeach the witness at all, much less to employ confidential communications. Alternatively, if the witness's prior statements to the government contain the same information that the witness previously provided in confidence to defense counsel, there will be little danger that the defense attorney will inadvertently exploit the previously confidential disclosures. Ordinarily, the prosecutor would have no duty before trial to disclose the witness's prospective testimony or to provide the witness's prior statements.<sup>111</sup> Yet, in the absence of a compelling justification—such as a legitimate concern that the defendant will suborn

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109. *Donnelly v. DeChristoforo*, 416 U.S. 637, 649 (1974) (Douglas, J., dissenting).

110. 108 S. Ct. at 1699.

111. *See, e.g.*, 18 U.S.C. § 3500(b); *United States v. White*, 750 F.2d 726, 728 (8th Cir. 1984) (defendant is not entitled to pretrial disclosure of the government's witness list); *United States v. Peterson*, 524 F.2d 167, 174 (4th Cir. 1975) (defendant is not entitled to pretrial disclosure of statements of government witnesses).

perjury—a prosecutor ought to reveal that information to the trial judge and defense counsel when it tends to show that disqualification is unnecessary.

In other cases, a prosecutor may be able to enter into stipulations in order to reduce the need for disqualification. Suppose, for example, that the prosecutor intends to call either the defense counsel's former client or the defense attorney himself as a witness, but that the defendant is willing to stipulate to the content of the witness's testimony in order to eliminate any potential conflict. Ordinarily, a prosecutor has no duty to enter into stipulations as a substitute for live testimony.<sup>112</sup> But when a stipulation would not materially affect the government's case, a prosecutor ought to agree to it if it will allow the defendant to retain his chosen counsel.<sup>113</sup>

### C. *Justifications for Disqualification Motions*

A prosecutor should seek defense counsel's disqualification only when the government has a compelling reason for overriding the defendant's choice of counsel. Moreover, in making a disqualification motion, a prosecutor should state precisely what interests she seeks to promote. By doing so, a prosecutor would minimize the public perception that her disqualification motion is a purely tactical device designed to obtain an unfair advantage over the defendant.

At least five plausible reasons might be advanced in criminal cases to explain a prosecutor's pretrial motion to disqualify opposing counsel notwithstanding the defendant's purported willingness to waive any conflict-of-interest claims.<sup>114</sup> It might be argued that the disqualification will serve: (1) to protect the government's case at trial from identifiable harm; (2) to advance a related investigation; (3) to promote the appearance that the trial was conducted fairly and in accordance with prevailing ethical norms; (4) to protect against the later reversal of a criminal conviction; or (5) to preserve appellate resources which might

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112. See, e.g., *United States v. Campbell*, 774 F.2d 354 (9th Cir. 1985); *United States v. Gilman*, 684 F.2d 616, 622 (9th Cir. 1982); *United States v. Peltier*, 585 F.2d 314, 324-25 (8th Cir. 1978); *Parr v. United States*, 255 F.2d 86, 88 (5th Cir.), cert. denied, 358 U.S. 824 (1958).

113. Cf. *United States v. Spletzer*, 535 F.2d 950, 955 (5th Cir. 1976) (government improperly introduced defendant's judgment of conviction, where the defendant offered to stipulate to a prior conviction and there was therefore no need for the evidence).

114. Other justifications might be advanced when a disqualification motion is made in the investigative stage of a criminal proceeding, see generally *Tague*, *supra* note 25, at 316-29, or when a disqualification motion is made before sentencing. Cf. *In re Abrams*, 56 N.J. 271, 275-76, 266 A.2d 275, 278 (1970) (defense counsel's receipt of a fee from the defendant's employer may discourage him from advising the defendant that if he cooperates with the prosecution's investigation of the employer he may obtain a more lenient sentence).

have to be expended in response to a claimed denial of the right to counsel. It is questionable, however, whether these reasons are all sufficiently compelling to justify an attempt to override the defendant's choice of counsel.

1. *Protecting against harm to the prosecution's case*—The prosecutor would be justified in seeking defense counsel's disqualification in order to prevent identifiable prejudice to the prosecution which might result at trial from the defense attorney's conflict. For example, in a case such as *Mannhalt*, in which the attorney must choose between being a witness or being an advocate, the defendant is not the only party whose concrete interests are at stake. There is a risk in such a case that the jury will discover that defense counsel has personal knowledge of relevant facts, such as facts which might be used to impeach a government witness. The government could be prejudiced if, perceiving defense counsel to be an unsworn witness, the jury chose to place undue weight on defense counsel's arguments.<sup>115</sup> In most cases, it would be unreasonable for the government to accept on faith that defense counsel will be careful not to suggest to the jury that he has personal knowledge of relevant facts. If there is no other reasonable way to protect the government from this type of prejudice, then the government would be justified in opposing defense counsel.<sup>116</sup>

Similarly, in a case in which the government anticipated that it would call defense counsel as a witness at the defendant's trial, the prosecutor might be justified in seeking counsel's disqualification. However, the motion would only be justified if the government had a genuine need for the attorney's testimony and there was a substantial likelihood that the attorney would in fact be called as a witness. Otherwise, the purported need for the attorney's testimony would justifiably be perceived as a pretext for eliminating an unwanted adversary.<sup>117</sup>

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115. See, e.g., *United States v. Kwang Fu Peng*, 766 F.2d 82, 86 (2d Cir. 1985); *United States v. Cunningham*, 672 F.2d at 1074-75 (2d Cir. 1982); *United States v. Cortelleso*, 663 F.2d 361, 363 (1st Cir. 1981).

116. The government would also have an interest in avoiding identifiable prejudice in a case such as *United States v. Ostrer*, 597 F.2d 337 (2d Cir. 1979), in which defense counsel, in the course of his former employment as a federal prosecutor, had obtained nonpublic information relevant to the defense of his client. See also *United States v. Miller*, 624 F.2d 1198 (3d Cir. 1980); *United States v. Walsh*, 699 F. Supp. 469 (D.N.J. 1988); but see *United States v. Washington*, 797 F.2d 1461 (9th Cir. 1986) (district court improperly disqualified defense attorneys, who were former government lawyers, without a hearing with respect to their assertion that they never received confidential information regarding the case).

117. See, e.g., *United States v. Perry*, 857 F.2d 1346 (9th Cir. 1988); see generally *Pierce & Colamarino, Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 HASTINGS L.J. 821 (1985); *Zwerling, Federal Grand Juries v. Attorney Independence and the Attorney-Client Privilege*, 27 HASTINGS L.J. 1263 (1976).

In most instances, however, the government will not suffer because of defense counsel's conflict of interest. For example, in cases such as *Iorizzo* and *Wheat*, in which defense counsel would be called on to cross-examine a past or present client, the government's case would not be harmed and, indeed, might benefit from defense counsel's possible inability to conduct a vigorous cross-examination. Similarly, in the common situation in which a single defense attorney represents jointly charged defendants, the government has no legitimate interest that is threatened by defense counsel's potential conflict; to the contrary, the government will be the likely beneficiary of any conflict of interest that emerges. Only on rare occasions will a prosecutor be able to point to any way in which the government's case at trial might be prejudiced by defense counsel's potential conflict of interest.

2. *Advancing a related criminal investigation*—The prosecutor might also seek to disqualify a defense attorney whose conflict of interest would tend to cause him to advise the defendant in a manner which would be adverse to the government's investigatory interest. For example, in *United States v. Kerlegon*,<sup>118</sup> the defendant, a commissioner of the Lake Charles Dock Board, was charged with extorting money from the head of a stevedoring company. In exchange, Kerlegon allegedly voted to award the company substantial business with the Port of Lake Charles. His attorney, Carter, was under investigation for receiving extortionate payments in connection with the same dock board vote. In urging Carter's disqualification, the prosecutor argued, in part, that Carter's interest in avoiding criminal charges would conflict with his duty to give his client competent advice about whether to plea bargain with the government. Specifically, Carter's personal interest might lead him to discourage the defendant from pleading guilty and cooperating with the government, since the defendant's cooperation might require him to testify against Carter. It is reasonable to assume that, in premising its disqualification motion on this potential conflict, the prosecutor was concerned about the government's interests no less than those of the defendant.<sup>119</sup>

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118. 690 F. Supp. 541 (W.D. La. 1988).

119. The government's investigative interest is implicated most often in organized crime and narcotics cases in which defense counsel for a low-level member of a criminal enterprise is paid by a high-level member and is, in effect, "house counsel" to the enterprise. Under such circumstances, the attorney's financial stake in continuing to obtain referrals from members of the criminal enterprise would lead him to discourage his client from cooperating with the authorities. See, e.g., *United States v. Padilla-Martinez*, 762 F.2d 942, 946-49 (11th Cir. 1985); A. DERSHOWITZ, *THE BEST DEFENSE* 398-400 (1982).

The government's investigatory interest has often been urged as a basis for seeking the disqualification of a defense lawyer who represents several targets of a grand jury investigation.<sup>120</sup> Courts have acknowledged the legitimacy of the government's investigatory interest and have recognized that, in such cases, a defense attorney has a conflict which may discourage him from advising any one client to cooperate with the government against the other clients. Some courts have held that, in order to protect "the right of the public to an effective functioning grand jury," defense counsel should be disqualified.<sup>121</sup> Other courts, such as New York's highest court in *Matter of Robert Abrams*,<sup>122</sup> have held that disqualification of defense counsel is inappropriate, reasoning that the prosecutor's interest could be served in other ways, such as by compelling individuals to testify in the grand jury under a grant of immunity from prosecution.<sup>123</sup>

For a variety of reasons, a trial court would probably be even less sympathetic to the government's investigative concerns in the post-indictment, pre-trial stage of a criminal prosecution. First, the defendant's interest in counsel of choice is greater after indictment than during a grand jury investigation.<sup>124</sup> Second, the defendant's decision not to cooperate does not significantly impair the government's investigation, since the prosecution may obtain the witness's testimony after the trial. Finally, the government's investigative interest is not implicated as clearly by a criminal prosecution as by a grand jury proceeding. For these reasons and others, a trial court would probably conclude that, unlike the institutional interests of the judiciary, the prosecution's investigative interests are not sufficiently important to outweigh the presumption in favor of the defendant's choice of counsel. Nevertheless, the legitimacy of the prosecution's investigative interests are sufficiently well established to justify a disqualification motion in a case in which those interests are at risk.

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120. See, e.g., *In re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *In re Investigation Before the February 1977, Lynchburg Grand Jury*, 563 F.2d 652 (4th Cir. 1977); *In re Investigation Before the April 1975 Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976); *Matter of Investigative Grand Jury Proceedings on April 10, 1979*, 480 F. Supp. 162 (N.D. Ohio 1979), *app. dismissed*, 621 F.2d 813 (6th Cir. 1980); *Matter of Grand Jury Proceedings*, 428 F. Supp. 273 (E.D. Mich. 1976); see generally Epstein et al., *Conflicts of Interest: A Trial Lawyer's Guide* 187-200 (1984).

121. *Matter of Grand Jury Proceedings*, 428 F. Supp. 273, 278 (E.D. Mich. 1976); see also *Matter of Investigative Grand Jury Proceedings on April 10, 1979*, 480 F. Supp. 162 (N.D. Ohio 1979), *app. dismissed*, 621 F.2d 813 (6th Cir. 1980).

122. 62 N.Y.2d 183, 476 N.Y.S.2d 494, 465 N.E.2d 1 (1984).

123. *Id.* at 198-99.

124. Cf. *Patterson v. Illinois*, 108 S. Ct. 2389, 2395-96 n.6 (1988) (a lawyer's functions at trial are much more varied than they are during a police interrogation of the defendant).

3. *Preserving the appearance that the trial is fair and that ethical standards are met*—A third possible justification for a disqualification motion would be to preserve the appearance that the defendant's conviction was the product of a trial that was conducted fairly and ethically. Like the trial court,<sup>125</sup> the prosecution has an institutional interest in ensuring not only that a criminal trial is actually fair but also that it appears to be fair.<sup>126</sup> That this interest may justify an attempt to override a defendant's choice of procedural options has been recognized in a variety of contexts. For example, in *United States v. Moon*<sup>127</sup> the Second Circuit agreed that the prosecutor properly had refused to consent to defendant Sun Myung Moon's waiver of a jury trial in light of her view "that there was an overriding public interest in the appearance as well as the fact of a fair trial, which could be achieved only by a jury."<sup>128</sup> A prosecutor has a similar interest in ensuring that the conduct of a trial conforms with prevailing norms of professional ethics.<sup>129</sup>

It may be questioned, however, whether moving to disqualify defense counsel generally promotes the appearance that trials are conducted fairly and ethically. In many cases, the public is likely to perceive a conflict of interest as simply a technical problem, rather than one that seriously undermines the fairness of a criminal proceeding. At the same time, a prosecutor's disqualification motion may add to public suspicion of the prosecutor and, if the motion is granted, of the court as well.<sup>130</sup> As noted earlier, it is beyond dispute that a disqualification motion may serve improper, as well as proper, purposes.<sup>131</sup> In opposing such motions, defense attorneys typically ascribe improper motives

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125. See *Wheat v. United States*, 108 S. Ct. at 1697 ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.").

126. See, e.g., *United States v. Cunningham*, 672 F.2d at 1072 n.7 ("We believe the government has a sufficient interest in preserving the integrity of a criminal proceeding in which one of its potential witnesses is a former client of the defendant's counsel to allow the government to raise the question [whether defense counsel should be disqualified].").

127. 718 F.2d 1210 (2d Cir. 1983), cert. denied, 466 U.S. 971 (1984).

128. *Id.* at 1217-18.

129. Cf. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR 1-103(A) ("A lawyer possessing unprivileged knowledge of a [disciplinary] violation . . . shall report such knowledge" to the court); *id.*, DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.").

130. Cf. *United States v. Washington*, 797 F.2d 1461, 1466 (9th Cir. 1986); *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976); *Trinity Ambulance Serv., Inc. v. G&L Ambulance Serv., Inc.*, 578 F. Supp. 1280, 1282 (D. Conn. 1984) ("Disqualification of attorneys during the course of litigation may . . . exacerbate the existing perception that judicial procedures are . . . overly dependent on technicalities.").

131. See *supra* note 18 and accompanying text.

to the prosecutor. A defense attorney's complaint that the prosecutor is merely attempting to eliminate a capable adversary has the virtue of impugning the prosecutor's motives while, at the same time, promoting a positive perception of the defense attorney. A prosecutor cannot easily dispel the resulting suspicion that her motion is in fact purely pre-textual, particularly in view of the popular perception of the adversary process, in which it would be anomalous for one party to assert the opposing party's interests.

When disqualification motions are designed to promote a positive public perception of the criminal proceeding, they should therefore be limited to those cases where the motions themselves are likely to do more good than harm. A disqualification motion might be justified, for example, when "both the likelihood and the dimensions of the feared conflict are substantial,"<sup>132</sup> so that, if he were to continue in the representation, defense counsel would probably become engaged in significant ethical misconduct which would adversely affect the quality of defense counsel's representation.<sup>133</sup> *United States v. Iorizzo* is a good example of a case in which a disqualification motion would have been appropriate.<sup>134</sup> Iorizzo's lawyer had previously represented the most important government witness during an administrative proceeding in which the witness gave testimony that was inconsistent with his trial testimony. It was important for the defense to explore the prior testimony on cross-examination of the witness, but, because of the prior representation, it would be impossible for the defense lawyer to conduct such an inquiry. Even if the defendant were to waive the ensuing conflict of interest, the defense lawyer's inability to conduct an effective cross-examination of the key government witness might have raised questions about the fairness of a judgment of conviction.

On the other hand, a disqualification motion would not promote a positive public perception of the criminal justice system in a case in which the defendant is willing to waive conflict of interest claims and the potential conflict is either remote or insubstantial. For example, in *United States v. Friedman*,<sup>135</sup> defense counsel's law firm had previously represented a government witness at a hearing before the SEC. Nevertheless, defense counsel's potential conflict of interest was both remote and insubstantial. The defense attorney's law firm had represented the witness only in its capacity as corporate counsel to the witness's com-

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132. *Wheat v. United States*, 108 S. Ct. at 1700-01 (Marshall, J., dissenting).

133. See, e.g., *United States v. Cunningham*, 672 F.2d at 1073, 1074.

134. See *supra* note 88 and accompanying text.

135. 854 F.2d 535 (2d Cir. 1988) *cert. denied*, 109 S. Ct. 1637 (1989). See *infra* note 137.



pany, and Friedman's lawyer had never himself conferred privately with or provided personal legal advice to the government witness. Thus, the defense attorney possessed no confidences that would have to be preserved, at the possible expense of a vigorous cross-examination. Moreover, the defense had no interest in cross-examining the witness concerning his prior SEC testimony, because the defense recognized that such cross-examination would open the door to potentially devastating redirect examination by the government. The defendant, a lawyer who was a former state prosecutor, adamantly insisted on being allowed to waive any conflict-of-interest claims relating to the prior representation.<sup>136</sup> An attempt by the prosecution to overcome that waiver could reasonably have been viewed by the public not as an effort to preserve the fairness of the trial, but as an effort to gain an unfair advantage based on a gossamer possibility of conflict.

4. *Protecting against a reversal of the conviction*—A prosecutor clearly would be justified in seeking defense counsel's disqualification if there were good cause to fear that the defendant's purported waiver could later be held to be invalid because it was not "knowing and voluntary."<sup>137</sup> This does not mean, however, that a disqualification motion will always be justified by the prosecutor's interest in preserving a judgment of conviction.

Courts have tended to overstate the risk of reversal following a purported waiver of conflict-of-counsel claims. For example, in *United States v. Sanders*,<sup>138</sup> a case decided shortly after *Wheat*, the district judge opined that "it is not altogether clear that the execution of a knowing and intelligent waiver of a potential conflict forecloses the possibility that an actual conflict would adversely have affected the adequacy of representation and violated Sanders' Sixth Amendment right to counsel."<sup>139</sup> The present case law does not justify the courts' professed concern. Appellate courts have held a defendant's waiver of conflict-of-interest claims to be ineffective only in cases where the trial judge failed properly to advise the defendant or adequately to question

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136. 854 F.2d at 572-74.

137. See *United States v. Friedman*, 854 F.2d 535, 572 (2d Cir. 1988) (the government moved to disqualify defense counsel because it "realiz[ed] that any conviction it might obtain against Friedman would be at risk" due to defense counsel's conflict of interest).

138. 690 F. Supp. 677 (N.D. Ill. 1988).

139. 690 F. Supp. at 679; see also *Wheat v. United States*, 108 S. Ct. 1692, 1698 (1988) ("[W]e note, without passing judgment on, the apparent willingness of Courts of Appeals to entertain ineffective assistance claims from defendants who have specifically waived the right to conflict-free counsel.").

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the defendant to ensure that the waiver was knowing and voluntary.<sup>140</sup> On the other hand, when the trial judge fully questioned the defendant and subsequently determined that the defendant's waiver was knowing and voluntary, courts have invariably rejected claims that defense counsel failed to provide adequate assistance on account of a conflict of interest.<sup>141</sup> There is thus little realistic possibility of reversal due to errors attributable to defense counsel's conflict as long as the waiver proceedings are conducted carefully.<sup>142</sup>

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140. See, e.g., *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986); *United States v. Unger*, 700 F.2d 445, 451-54 (8th Cir. 1983); *Zuck v. Alabama*, 588 F.2d 436, 440 (5th Cir.), cert. denied, 444 U.S. 833 (1979); *United States v. Alvarez*, 580 F.2d 1251, 1260 (5th Cir. 1978); *United States v. Gaines*, 529 F.2d 1038 (7th Cir. 1976).

141. See, e.g., *United States v. Roth*, 860 F.2d 1382, 1387-89 (7th Cir. 1988); *United States v. Beniach*, 825 F.2d 1207, 1210 (7th Cir. 1987); *United States v. Williams*, 809 F.2d 1072, 1085 (5th Cir. 1987); *United States v. Akinseye*, 802 F.2d 740, 745 (4th Cir. 1986); *United States v. Krebs*, 788 F.2d 1166, 1173 (6th Cir. 1986); *United States v. Noble*, 754 F.2d 1324, 1334-35 (7th Cir. 1985); *United States v. Bradshaw*, 719 F.2d 907, 911 (7th Cir. 1983); *United States v. Waldman*, 579 F.2d 649, 652-53 (1st Cir. 1978); see also *Holloway v. Arkansas*, 435 U.S. at 483 n.5 (citing *Glasser v. United States*, 315 U.S. 60 (1942)).

142. Several courts have suggested that if the defendant's waiver of potential conflicts is not sufficiently broad, then the defendant's waiver may not foreclose all subsequent claims based on errors attributable to an actual conflict that emerged at trial. However, this concern may easily be addressed by requiring the defendant to make a broad waiver of all claims relating to defense counsel's potential or actual conflict.

For example, in *United States v. Fahey*, 769 F.2d 829, 835 (1st Cir. 1985), a panel of the First Circuit suggested that the waiver of potential conflicts of interest may not be tantamount to a waiver of actual conflicts of interest. Thus, the court suggested that, notwithstanding a pretrial waiver, a defendant may be entitled to a new trial if he can show that his trial attorney had an actual conflict which impaired his representation. The court's suggestion is highly questionable, since a waiver of potential conflicts would ordinarily be viewed as a waiver of all sixth amendment claims based on defense counsel's conflict of interest. See *supra* note 32. But even if a court were to construe waivers narrowly, the disqualification of counsel would not be necessary, since an express waiver of all conflict-of-interest claims could be demanded instead.

Similarly, in *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 436-37 (7th Cir. 1973), a panel of the Seventh Circuit suggested that a defendant who waived his right to conflict-free representation might later claim that his "attorney acted incompetently in deciding jointly to represent [him] and his co-defendants." Thus, a defendant may claim that he was denied his right to receive competent advice concerning whether to seek independent counsel. Even assuming, however, that the conventional waiver is not broad enough to foreclose this claim, this claim can still be averted by measures short of disqualification. For example, the court might require the defendant to consult with independent counsel before deciding whether to waive his sixth amendment right. Moreover, the court might require the defendant explicitly to waive any ineffective assistance of counsel claims based upon the trial lawyer's advice and decision regarding the joint representation.

There is no reason why the broader waivers would be inadequate. In a related context, it is well recognized that a defendant's waiver of the right to counsel and decision to represent himself forecloses later claims that he was denied effective representation. See, e.g., *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975) ("A defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel."); *United States v. Roggio*, 863 F.2d 41, 43 (11th Cir. 1989); *Hance v.*

A motion to disqualify counsel in order to preserve a criminal conviction is only justified when there is a genuine risk, and not just a theoretical risk, of reversal. A genuine risk may exist, for example, where, the defendant was not competent to understand the complexities of defense counsel's conflict and the risks it posed,<sup>143</sup> or where, at the time he sought to make his waiver, the defendant was not in an adequate position to anticipate all the conflicts that might later arise.<sup>144</sup> In the run-of-the-mill case, however, a disqualification motion would not be justified simply as a means of protecting against a later reversal of the defendant's conviction.

5. *Avoiding the expenditure of appellate resources*—Finally, a prosecutor might seek defense counsel's disqualification in order to avoid the later expenditure of resources on post-trial litigation in which the defendant challenges the adequacy of trial counsel. This purported interest is not entirely insubstantial,<sup>145</sup> since a defendant's waiver of conflict-of-interest claims at trial will not necessarily relieve the prosecution of the burden of demonstrating on appeal that the waiver was valid.<sup>146</sup> It is doubtful whether the interest in preserving government

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Zant, 696 F.2d 940, 950 (11th Cir.), *cert. denied*, 463 U.S. 1210 (1983); *United States v. Rowe*, 565 F.2d 635, 637 (10th Cir. 1977). It makes sense that waivers of the right to conflict-free representation should similarly be interpreted to waive all claims of attorney incompetence attributable to conflicts of interest.

143. *See United States v. Quinones*, 613 F.2d 47 (3d Cir. 1980) (*per curiam*); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); *cf. United States v. Donahue*, 560 F.2d 1039, 1042 (1st Cir. 1977).

144. *See United States v. Padilla-Martinez*, 762 F.2d 942, 946-49 (11th Cir. 1985) (trial judge was not provided sufficient information to enable him to explain the potential conflict to the defendants); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); *United States v. Calabria*, 614 F. Supp. 187 (E.D. Pa. 1985); *United States v. Dickson*, 508 F. Supp. 732 (S.D.N.Y. 1981); *United States v. Helton*, 471 F. Supp. 397 (S.D.N.Y. 1979); *cf. United States v. Akinseye*, 802 F.2d 740, 745-46 7 n.3 (4th Cir. 1986); *United States v. Agosto*, 675 F.2d 965, 976 (8th Cir.), *cert. denied*, 459 U.S. 834 (1982); *United States v. Partin*, 601 F.2d 1000, 1008 (9th Cir. 1978) ("If the conflict of interest problem which [the defendant] raises on appeal had been a completely unknown contingency prior to his trial, we might be reluctant to find waiver of his right to counsel free from conflict of interest.").

145. *Cf. United States v. Jones*, 623 F. Supp. 110, 114 (E.D. Pa. 1983) ("A criminal defendant's right to be represented by the counsel of his choice must be balanced against the public's interest in a fair criminal proceeding, free from future attacks.").

146. One prominent illustration of this is the recent case of Stanley Friedman, a former New York City official who was convicted of racketeering and other charges arising out of his role in a bribery scheme. *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989). Citing the Second Circuit's decision in *Iorizzo*, the government filed a pretrial motion to disqualify Friedman's well-known trial attorney, Thomas Puccio, who had previously represented one of the government's prospective trial witnesses. In response, Friedman agreed to waive any purported conflict and, at the same time, questioned the prosecution's good faith in filing the motion. Friedman told the press that the motion was nothing more than "another outrageous media ploy to deprive me of a fair trial," N.Y. Times, May 9, 1986, at p. B-3, while his

resources alone is sufficiently compelling to justify an effort to override the defendant's choice of counsel in a case where there is little reason to doubt that the defendant's waiver will ultimately be found to be valid. Most defendants will challenge a criminal conviction without much regard for their likelihood of success.<sup>147</sup> Challenges to the adequacy of counsel, in one form or another, are among the claims that are advanced most frequently by convicted defendants, and responding to such claims, particularly where there was a waiver at trial, does not require a great expenditure of resources. Certainly, a response to a conflict of interest claim requires no greater effort than a response to the alternative claim that would be raised if defense counsel were disqualified, namely, that the trial court abused its discretion in overriding the defendant's waiver.<sup>148</sup> For these reasons, it is hard to justify attempting to deprive a defendant of his choice of counsel merely for the convenience of avoiding an unmeritorious claim on appeal.

### CONCLUSION

Recent decisions have recognized that when a prosecutor learns of defense counsel's potential conflict of interest, she has an affirmative obligation to act before trial to ensure that the defendant's interests will not be impaired without the defendant's voluntary, informed consent. This obligation involves, as a first step, advising defense counsel of the potential conflict. If defense counsel does not withdraw from the representation and does not initiate a hearing to place the defendant's waiver on the record, then the prosecutor should advise the trial court of the potential conflict and ask the court to inquire into the defendant's willingness to waive potential conflicts. If the court is unwilling to undertake such an inquiry in the absence of a formal disqualification motion,

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trial attorney suggested to the court that the motion was merely an attempt to delay the trial. 854 F.2d at 572.

Acceding to the defendant's desire to continue with Puccio's representation, the district court denied the government's motion. But this did not discourage Friedman from retaining a new lawyer following his conviction and arguing strenuously on appeal that he had been deprived of conflict-free representation because of Puccio's former representation of the government witness. The Second Circuit ultimately "conclude[d] without difficulty" that Friedman had knowingly and voluntarily waived this claim, *id.* at 574, but not before both the government and the appellate court were compelled to address the issue at considerable length.

147. Defense counsel may file an appeal without regard to the likelihood of success except in those rare cases in which the appeal would be "wholly frivolous," that is, "lack[ing] any basis in law or fact." *McCoy v. Court of Appeals of Wisconsin District 1*, 108 S. Ct. 1895, 1902 & n.10 (1988); *accord* *United States v. Anders*, 386 U.S. 738 (1967).

148. *Cf.* 108 S. Ct. at 1698 ("trial courts confronted with multiple representations face the prospect of being 'whip-sawed' by assertions of error no matter which way they rule").

then such a motion should be filed for the limited purpose of promoting a judicial hearing. If, at such a hearing, the defendant fails to make a valid waiver, then the prosecutor should seek defense counsel's disqualification in order to avoid having a subsequent conviction reversed on appeal because of defense counsel's conflict of interest.

When a defendant is willing, however, to make a valid waiver of the right to conflict-free representation, prosecutors must be circumspect in deciding whether to seek defense counsel's disqualification, since the government's selective use of disqualification motions may be perceived, correctly or not, as an unfair tactic intended to deny defendants access to the best attorney. At minimum, prosecutors' offices should issue and follow guidelines governing the decision whether to seek disqualification. Such guidelines should require prosecutors to provide reasonable cooperation where necessary to reduce the need to disqualify defense counsel.

In addition, such guidelines should limit disqualification motions to cases where there is a strong justification for the prosecutor's intervention. For example, disqualification of counsel could appropriately be sought in certain cases to promote the public perception that the defendant's trial is being conducted fairly and ethically; but this rationale would apply only where there is a substantial likelihood that defense counsel will have a conflict of interest which will significantly impair his ability to defend the accused. A disqualification motion would also be appropriate where the government's own investigative interests or its legitimate prosecutorial interests at trial may be adversely affected because of defense counsel's conflict.

Finally, prosecutors should be encouraged to state precisely which interests they are seeking to promote by moving for disqualification. The adoption and implementation of such guidelines would significantly diminish cause for skepticism about the prosecution's motives and thereby contribute to the perception that criminal proceedings are in fact being conducted fairly and ethically.